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Kansas City Bar Association Reproduces Convention of 1787

THINK of an audience of ten thousand people assembled to witness the dramatic presentation of a historical event by a city Bar Association; think of this gathering almost filling the vast convention hall built to house great assemblies like our national political conventions; think of this assembly of the general public entering fully into the spirit of the performance and going home with the echoes ringing in its ears and a better knowledge of what the event meant—and you will have some idea of the triumph achieved by the Bar Association of Kansas City in its recent reproduction of the Convention of 1787.

This performance was given on Sept. 17, 1932, by the Bar Association as its contribution to the Washington Bicentennial Celebration. Visualize the scene. On a stage amid the vast assemblage is a platform on which the drama is to unfold itself. The characters are all in the costume of the time. The band plays patriotic airs, helping to intensify the patriotic atmosphere. The proceedings begin with a few words from Mr. William Paul Pinkerton, General Chairman of the Bicentennial Committee, introducing President T. J. Madden of the Kansas City Bar Association. Now Mr. Madden is speaking. It is a fine and fitting prologue to the scenes to follow. He says, in part:

"Fellow Americans: I want you to come back with me 145 years ago to Philadelphia, a town of less than thirty thousand souls. It is in the spring of 1787. That place and that year are about to become immortal in the annals of constitutional liberty.

"The surrounding forests abound in foliage and are radiant with bloom. Nature is abundantly rich and joyous, but the country is in despair. Over broken and almost impassible roads, from remote and isolated parts of this land of the pioneer, delegates are traveling towards this center of interest where a convention is to be held for the purpose of considering the state of the Union and of amending the Articles of Confederation.

"The American Revolution is over. Three years have now passed since Congress ratified the treaty of peace. But the National Treasury is empty. The national debt is due and cannot be refunded—not even the interest has been paid—and public credit is gone. The Continental script is worthless. There is no medium of exchange. The Revolutionary soldiers have not been paid. Congress has no authority to levy a tax. It can only recommend to the sovereign states and they utterly ignore its requisitions. All power resides in those states, but they refuse to act.

"They levy import duties not only on foreign commerce, but the trade of their sister states. Each state is intensely jealous of its rights. The little states demand equal representation with the largest if there is to be a federal union. All of them treat the Confederation with contempt. They violate its treaties with impunity and bring it into disrepute with other powers. They are indifferent as to the payment of the public debt. The spirit of repudiation as to all debts, public and private, is in the air. Last year Dan Shay and his fellow insurrectionists in Massachusetts closed the courts to prevent the collection of debts. Everywhere there is antagonism to government. All restraint is odious to the unbounded freedom of this new country just released from British rule. They declare that they did not reject a foreign master to adopt a domestic tyrant in government. The Confederation is widely

regarded as a mere exigency of war, and now that the war is over they say the necessity for a Federal Government is past. The bond of union has weakened and the Confederation has become a rope of sand.

"England looks on with complacency. Her troops still maneuver at the posts in the northwest and threaten our frontier. She claims a technical right under the treaty stipulations to remain there until the property rights of her faithful Tories are recognized and British debts are paid. She ignores our National Government and will not send an Ambassador to our Court. She discriminates against our commerce and drives it from her ports and we have no power to retaliate as a united nation. Our creditors, France, Holland and Spain, are in the offing awaiting the collapse. Disorder and disloyalty walk abroad. The rumble of revolt is heard. It is an hour of tenseness and dread in a nation's life. What is to be done? To answer that question this Convention is about to assemble.

"The Constitutional Convention of 1787 consisted of fifty-five men representing twelve states, and it contained the cream of American intellect. Their experience and talents were varied. Many had held public office. Some were men of large business interests. Others were in very modest worldly circumstances. More than half were college graduates, and thirty-one of the fifty-five were lawyers. All of them were practical men who had been trained and developed in the grim university of Nature. They were students of government and understood the ways of politics. They were masters in debate.

"This assembly was a very different body from the first Continental Congress. That was a body of protest; this body was to formulate and found a government. All shades of political belief were reflected there. Only a few of the original Revolutionary statesmen were members. It was a new and changed order which came together with the all-controlling purpose of establishing a Federal Government of dignity and power which would be an efficient and independent sovereignty in itself and yet not impair the natural rights of the people to life, liberty and the pursuit of happiness. That they succeeded well is attested by the experience of our country and the general opinion of all mankind. They gave us a system of government with strictly limited powers, without any right to prescribe a religion or regulate our morals. They recognized the principle that government is instituted among men not to make them good, but to make them free.

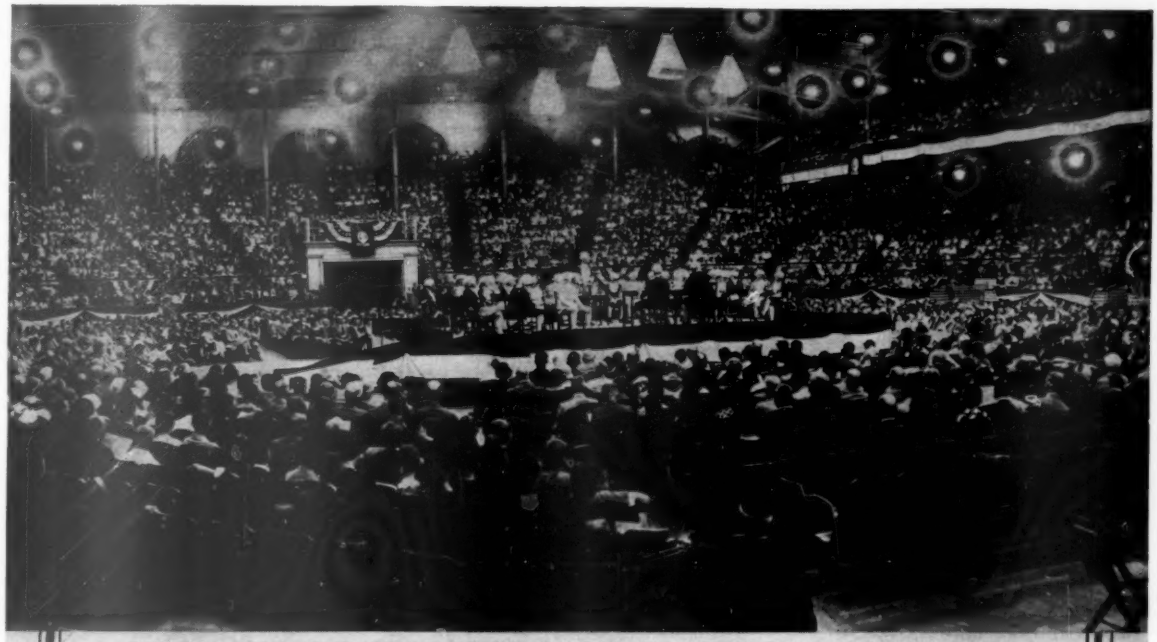
"This Convention was a secret body and their deliberations were withheld from public kowledge until their work was done and the Constitution finally ratified by the states. This method of procedure furnished a point of attack for the enemies of the new Constitution in the struggle for its adoption, but it is morally certain that the publicity of these proceedings would have defeated the purpose of the Convention. These leaders were well aware of the susceptibilities and frailties of human nature and thoroughly understood the so-called 'common man.' They knew the danger of mass ignorance. Hence, every step taken in this superhuman endeavor to establish a free government on a constitutional basis was through delegated authority. In no instance was the Constitution submitted to a direct popular vote in any state. The inventor of the initiative and referendum, thank God, had not yet been born. Had there been a Missouri or Kansas primary system in vogue at that time, there would never have been a Constitution of the United States.

"The credit for the drafting and adoption of the Constitution cannot be ascribed to any particular individual. The march of events stimulated the thought of the times into finding a remedy for the defects of the Confederation government. Public and private interests both contributed to that end. However, certain great characters of this Convention stand out from among the rest. . . .

"No matter what credit may be given to others, there can be no doubt that the most potent influence of all was the character, personality and ability of George Washington. His name and judgment carried weight with the most extreme opponents of the proposed government. He had early pointed out the fatal defects of the Confederation. He wrote letters to the Governors of all the states advocating a strong central government to preserve in peace the benefits that had been won by war. He inspired the calling of this Convention. He presided over its deliberations and gave it the benefit of his counsel. He recommended the new Constitution to the states and advocated its adoption. His influence was especially effective in his own state of Virginia, where the opposition was most intense and bitter. History concedes that the credit for the adoption of the new Constitution belongs to Washington. His services in behalf of the Constitution mount higher in value than his services on the battlefields of the Revolution.

"This bi-centennial memorial, extending almost across this year, is an extraordinary honor, but no honor can exceed or equal the worth of this man. To pay a tribute to George Washington is something which no one can do with adequate felicity or justice. He has no competitors in the field of fame and therefore cannot suffer or be exalted by comparison. History has taken his measure and he stands apart from all others in the civic virtues, in sound statesmanship, and above all in his love for the great Republic. Others have appealed for distinction to mankind in general, but Washington appealed solely to his own countrymen. He conceived it a higher duty to save his country than to save the world. He was not an internationalist; he was an American. As his day recedes into the background of history, his figure will not diminish but enlarge and about his attractive personality will gather, as the ages come and go, the sweet romance of service and sacrifice, expressive of the highest and holiest aspirations of the patriotic spirit until he will be idealized, and in a measure apotheosized, into the Patron Saint of American Nationality. May he be held and regarded by us forever, not only as the Founder of our Government and the Father of our Country, but as the Ideal American.

"I now direct your attention to the scenes (which will immediately take place on this platform), in the drafting of that immortal document which gave to liberty the embodiment of law, and not only put an end to social discord and governmental chaos in America, but carried a challenge to tyrants and tyrannies everywhere and brought



PORTION OF AUDIENCE OF 10,000 PEOPLE WITNESSING REPRODUCTION OF THE CONSTITUTIONAL CONVENTION OF 1787 BY MEMBERS OF THE BAR ASSOCIATION OF KANSAS CITY, MO.

MEMBERS OF THE BAR ASSOCIATION OF KANSAS CITY, MO., IN COSTUME, REPRESENTING LEADING CHARACTERS IN CONVENTION OF 1787

hope and promise to all the downtrodden peoples of the earth."

Then the convention begins. The framer of the text, with rare skill, has selected and arranged episodes and speeches from the long record of the convention to meet the demands of a two-hour presentation. Yet the impression is not of scattered fragments nor of a mere historical sketch. All the elements of drama are there, in spite of the decorum of parliamentary procedure and the lack of theatricalism. There is a movement of ideas, a clash of minds and wills. The audience feels and understands. To quote from an extremely good and sympathetic account in the Kansas City Star of Sept. 18:

"The crowd caught the import of the drama at last. Those who were playing the part of the nation's people—the rich, the poor, the unpaid soldiers of the Continental army (probably urging a bonus then as the service men are urging a bonus today), the tillers of the soil (struggling to make enough to meet the cost of production), the merchants, fearful of mounting taxes involved in the new government—all were in that crowd at Convention Hall and all began to get the idea of the work going on before them.

"The audience, playing its part, warmed to one

speaker after another. It heard a speaker plead for a plurality of Executives. That was strange. Think of it! What if the United States had three Presidents? Well now, wouldn't that complicate things in campaign years? They heard the plea of Alexander Hamilton that the President be elected for life and that there be a senate made up of men elected for life and a house chosen from among the people for three-year terms. Now wouldn't that be a fine state of affairs!"

The years roll back, the illusion grows, and it is the year 1787 and the place is Philadelphia. Washington, on taking the chair, laments his lack of qualifications and begs the indulgence of the House towards involuntary errors which might be occasioned by his inexperience. George Wythe of Virginia presents the standing rules, as proposed by the Committee of which he is chairman. Edmund Randolph presents the "Virginia Plan," Charles Pinckney the "Carolina Plan," William Paterson the "New Jersey Plan." Benjamin Franklin rises to object to paying the Executive a salary, George Mason, James Wilson and Alexander Hamilton present their views on points of the great problem before the Convention. Dr. Franklin recalls the Convention to the wisdom of praying Divine Providence to "illuminate our understandings," and James Madison, the "Father of the Constitution," lucidly expounds his opinions.

Dr. Franklin again rises—this is the last of the four episodes into which the production is divided—to urge each delegate who still has objections to the draft of the Constitution "to doubt a little of his own infallibility, and, to make manifest our unanimity, to put his name to this instrument." Nathaniel Gorham complains of the small proportion of representatives to population, and George Washington breaks his silence to concur in this view. Edmund Randolph explains why he does not sign, and declares that this does not mean that he will oppose the Constitution out of doors. Gouverneur Morris declares that he takes it with all its faults, considering it the best plan to be attained. Alexander Hamilton declares "it is my anxious appeal that every member should sign the Constitution." Then—to quote again from the account in the Kansas City Star:

"As the delegates went forward to sign the Constitution the Central church choir of the Reorganized Church of Jesus Christ of Latter Day Saints lifted their voices in the 'Star-Spangled Banner.' Miss Clyde Anderson's soprano was a clarion. The men and women paused on their way to exits. They, too, joined in the song of the American nation. They were aware that a nation had been founded before their eyes, that the drama wasn't hidden by lights and actors and trimmed with silks and satins of the early American period.

"No, the drama was still unfolding, the Constitution was still enshrined in their hearts, living and life-giving. They were part of the pageant as much as those lawyers, who, on Monday, would be going to court and writing briefs and hearing motions. The Constitution was their document. The Star-Spangled Banner still waved."

And the presentation closed with the unforgettable words of Franklin, inspired by a picture which hung directly behind Washington's chair and which depicted a flaming sun: "I have often and often in the course of this session, and the vicissitudes of my hopes and fears as to its issue, looked at that picture of the sun, behind the President, without being able to tell whether it was rising or setting; but now, at length, I have the happiness to know that it is a rising, and not a setting sun."

Mr. William Paul Pinkerton was General Chairman of the Committee on Production and Arrangements. The following were chairmen of special committees: Lynn Webb, Hall and Seating; Leland Hazard, Distinguished Guests; Harlow B. Lester, Program; Frank P. Barker, Finance; Edward S. North, Publicity. The Proceedings and Debates of the Convention were selected and arranged by Robert K. Ryland. Mr. H. L. Drake was dramatic director.

Members of the Kansas City Bar in the stage group picture are as follows: Seated, left to right—Judge C. Jasper Bell (Charles Cotesworth Pinckney, S. C.); Fred A. Boxley (Dr. Hugh Williamson, N. C.); Ellison A. Neel (John Rutledge, S. C.); W. H. H. Piatt (Charles Pinckney, S. C.); Judge Alfred M. Seddon (Nathaniel Gorham, Mass.); Judge Fred S. Hudson (Rufus King, Mass.). Standing, left to right—Edward D. Ellison (William Jackson, Penn.); Ingraham D. Hook (Robert Morris, Penn.); Jesse Andrews (Gouverneur Morris, Penn.); J. Benjamin McGilvray (Daniel of St. Thomas Jenifer, Md.); John B. Gage (Daniel Carroll, Md.); Omar E. Robinson (Elbridge Gerry, Mass.); John B. Pew (James Wilson, Penn.); John S. Cannon (George Mason, Va.); Robert K. Ryland (Alexander Hamilton, N. Y.); Frederick E. Whitten (Edmund Randolph, Va.); Sam B. Sebree (Chancellor George Wythe, Va.); O. T. Thomsen (William Livingstone, N. J.); Henry M. Beardsley (William Paterson, N. J.); Arthur Miller (Benjamin Franklin, Penn.); Judge Elmer N. Powell (John Dickinson, Del.); Judge John I. Williamson (Washington); Judge Thomas V. Holland (William Few, Ga.); James K. Houghton (John Langdon, N. H.); Floyd E. Jacobs (James Madison); Clay C. Rogers (William Samuel Johnson, Conn.); J. M. McCune (Roger Sherman, Conn.).

Second Annual Meeting of National Conference of Bar Examiners

SOME twenty states and fourteen different law schools were represented at the Second Annual Meeting of the National Conference of Bar Examiners in Washington on October 10th. The formal program consisted of papers by the Chairman, Mr. James C. Collins; Dean Albert J. Harno, President of the Association of American Law Schools; Mr. Alfred Z. Reed, of the Carnegie Foundation for the Advancement of Teaching, and Mr. William Harold Hitchcock, Chairman of the Board of Bar Examiners of Massachusetts.

In the afternoon a series of four round tables was held dealing with questions of interest to Bar Examiners, character committees, and those interested in the general subject of admissions to the Bar. These were well attended and a transcript of their proceedings was taken in order that they might subsequently be published in "The Bar Examiner."

At a business meeting Tuesday morning a set of by-laws was adopted giving permanent form to the organization. The following resolution was favorably reported on by the Executive Committee

and was carried by unanimous vote of the Conference:

"WHEREAS the history and tradition of the legal profession offer precepts and examples conducive to a sound understanding and appreciation of the profession, its proper functions and relation to society, and such an appreciation tends toward high standards of professional conduct, elevating both the individual and the bar, and,

"WHEREAS, the Conference believes that adequate preparation for a career at the bar includes proper attention to instruction in this field, with an intelligent understanding of the canons of ethics of the profession, their significance, application and meaning,

BE IT THEREFORE RESOLVED that the Conference recommend to all bodies dealing with the examination of applicants for admission to the Bar that such inquiry be made into the qualifications of the applicant, as to assure his possession of a fair knowledge of the history, background, traditions and functions of the legal profession, and its standards of professional conduct."

Following this, Mr. Elmer L. Hatter, Chairman of the Board of Examiners of the American Institute of Accountants, discussed in detail the establishment and procedure of that Board. A discussion of the application of its principles to bar examinations revealed some interest on the part of the examiners present in the project of setting up a national board which would furnish questions to the states for their optional use. The advisability of setting up such a board was referred back to the Executive Committee with an authorization to them to canvass the opinion of all examining boards on the subject.

A nominating committee consisting of Mr. Bartlett, of California; Mr. Denious, of Colorado, and Mr. Hitchcock, of Massachusetts, reported the following nominees for offices of the Conference for the ensuing year: Mr. James C. Collins of Rhode Island, for President, and Mr. Will Shafroth of Colorado, for Secretary-Treasurer. They were unanimously elected. These officers will serve ex-officio as members of the Executive Committe of the Conference.

Acting in pursuance of the newly adopted by-laws, Mr. Collins appointed the following members of the Executive Committee: For a two-year term —Mr. A. L. Bartlett, California, and Mr. Stanley Wallbank, Colorado. For a one-year term—Mr. A. G. C. Bierer, Jr., of Oklahoma, and Mr. Stuart B. Campbell, of Virginia. Mr. Philip J. Wickser of Buffalo, as the immediate predecessor in office of the Chairman, automatically becomes a member of the Executive Committee.

Chairman of the New Body of Vice-Presidents

HON. ORIE L. PHILLIPS, United States Circuit Judge for the Tenth Circuit, was chosen Chairman of the newly created body of Vice-Presidents of the Association. It will be recalled that the Constitution was amended at the recent Annual Meeting at Washington to provide for a Vice-President for each Federal Circuit, thus doing away with the previous plan of having one for each state. The idea behind the change is to give the office additional importance and to provide a body of officers who will be able to relieve the President of some of his present burdens and will also be active in maintaining the contact of the American Bar Association with the State Bar Associations in their respective circuits.

RESTATEMENT OF CONTRACTS IS PUBLISHED BY THE AMERICAN LAW INSTITUTE

Chief Justice Hughes Says That Completion of Restatement of This Subject Is an Event of the First Importance and That It Demonstrates the Feasibility of Institute's Distinctive Method of Cooperation in Development of the Law—Samuel Williston Speaks of Conditions Justifying Institute's Plan and Stresses Its Cooperative Aspect —James Byrne Recalls Assertion of the Late James C. Carter That a Scientific Statement of the Law Would Be Priceless and an "Indispensable Tool" to the Profession—George Wharton Pepper Emphasizes Significance of Annotation Work by State Bar Associations—Institute Progress to Date

STATEMENT OF CHIEF JUSTICE HUGHES IN RELATION TO THE PUBLICATION OF THE RESTATEMENT OF CONTRACTS BY THE AMERICAN LAW INSTITUTE

THE completion of the Restatement of Contracts is an event of first importance, not only or chiefly because of the nature of the subject, but because it vindicates the enterprise of the American Law Institute and demonstrates the feasibility of its distinctive method of cooperation in the development of the law. The limitations of the work of the Institute are as striking as its achievement. It does not seek to establish a code with the stamp of legislative authority. That would be a vain effort, and even if it were possible of accomplishment, the success would be illusory in its intimation of finality. The purpose of the Institute is not to promote legislative restrictions but to improve the paths of reason.

We have digests and encyclopedias which seek to classify myriad decisions, but are of slight aid to their mastery. Textbooks are generally condensed encyclopedias, and there are very few which are of eminent authority because of competent and penetrating discussions. The writings of law professors, and of others who are experts in particular subjects of legal study, have come to constitute the critical work of chief importance, but these individual productions may themselves invite criticism not less effective than their own. What has been needed is to bring judicial decisions, commentators and critics alike before a common judgment seat of expert opinion. This has been achieved through the new technique developed by The American Law Institute.

The need of this sort of enterprise is shown by the fact that even in such a subject as Contracts, which it might be supposed is as well understood as any subject in the law, the work of the Institute under the most careful supervision, and with the most skilful draftsmen, has required nine years for its fulfillment and a host of preliminary and tentative drafts. No such cooperation has ever been known in the field of the common law, and valuable as is this first fruition of this collaboration, the method which has made it possible holds, I think, even a higher promise of benefit than that which will follow the immediate use of the Restatement. For this method not only leads to a better understanding and mastery of the principles of law and thus aims at diminishing confusion and uncertainty in their application, but it also points the way to success in dealing with a great variety of problems affecting the administration of justice. If we can get judges, members of the Bar, and those who are devoting their lives to the study of the law and administration, to unite in a common endeavor to secure the most competent judgment as to practicable measures to attain simplicity, directness and promptitude, we shall be able to discharge the special obligations which rest upon our profession.

The Institute has done well to make haste slowly. Its organization and method are too important to be put to a premature test. Those, to whose difficult and well-sustained labors the present monumental achievement is due, deserve the unqualified commendation and gratitude not only of judges and lawyers but of the entire public.

(Signed) CHARLES E. HUGHES.

October 18, 1932.

THE RESTATEMENT OF CONTRACTS: STATEMENT BY SAMUEL WILLISTON

NO LAWYER is likely to question the desirability of the slow development of law by determination of particular problems as they arise. Indeed it is hard to conceive how a system of law can arise otherwise. Whether the problems are answered by statutes of a legislative body or by decrees of an absolute monarch, or by decisions of judges, nothing worthy to be called a system can be created except by the gradual coordination of determinations of former problems. Law does not deserve the name of a system unless it passes beyond rules that govern a single particular case. The exact facts of a former case seldom recur; some new facts exist in the later case, or some of the old facts do not, and inquiry cannot be avoided as to what were the vital or essential facts on which the previous

determination was based. Thus general principles as well as special rules are developed. A country may indeed adopt by a simple fiat an entire body of law. Many countries have done this by adoption of the Roman Law, either in the form of a code or otherwise; but in so doing they are not creating, they are merely taking to themselves a product formed beyond their own borders.

The rules to be derived from a multitude of decisions are sometimes clear and sometimes open to dispute; but in any event the sources from which the rules are to be sought become more and more bulky as time passes. Inconsistencies, uncertainties and complexities are the sure accompaniments of bulk, as well as increased expenditure of time in seeking applicable rules. The difficulty has not become overwhelming as yet, but surely must become so. One need only multiply the annual production of law reports by a number of years, say fifty or one hundred, small in the history of a country, to realize what search in an accumulated mass of decisions may mean.

It is not wise in seeking relief from the difficulties that I have just suggested to wait until they become overpowering. The situation is sufficiently serious now to make it evident that the prodigious material from which our law must be sought should be summarized as effectively and as soon as possible. Any satisfactory solution takes time, and it is none too early to begin.

English and American law is not the first to suffer from finding its sources of law unwieldy, and sometimes contradictory. Justinian was faced with practically the same problem when the Roman law had to be sought from numerous and often conflicting opinions of many jurists. He sought a solution by selecting the opinion of those jurists most distinguished for learning and sound judgment, and by collecting these opinions in a digest under various headings, thus indicating the rules applicable to a great number of states of fact.

The first Napoleon in dealing with the problems of stating a National law, based on variously interpreted customary law and modernized Roman law, ordered the production of the Code that bears his name. That Code has served as a model followed in the main by nearly every country of Western Europe as well as by the countries of South and Central America, and by Louisiana and Quebec. The Civil Code and other codes of Germany and Switzerland in more recent years have sought a like solution for similar problems.

In England and America to some extent codification of special parts of the law has been adopted as a method of summarizing the results achieved by judicial decisions; but in the main reliance has been had in digests and treatises. Neither codification nor digests and treatises promise to afford a satisfactory solution of the difficulties imposed by the enormous output of decisions as the sources from which the law must be sought. It is true that carefully drawn statutes codifying the law of particular subjects are an effective means of summarizing the law so far as it has been developed. Lawyers often fail to recognize how far this method of summarizing has been carried. Criminal law and much of the commercial law is already in the form of statutes. England has gone further in this direction than the United States. There can be no doubt that the method adopted in England and the United States of codifying a particular subject at a time, is better for English speaking people at least, than that generally adopted in other countries of constructing codes supposed to contain in substance the whole law. Statutes, however, are not likely at present, or in the immediate future, to afford an adequate solution to the problem presented by the bulk and diversity of decisions. And so far as a solution is ultimately approximated in that way the solution will be aided and more satisfactorily carried out if a preliminary attempt is made, as it is in the Restatement, to frame rules in statutory form, the correctness of which can be tested by the courts when there is not the rigidity that statutes necessarily have.

The experience of the Commissioners on Uniform State Laws shows how slow the process is of securing general enactment of any statutes. Moreover, in spite of the instances given of partial codification, the purpose of statutes as generally conceived by American lawyers and legislatures is as yet rather to supplement the common law or to modify provisions of it that have not worked well than to summarize the common law.

Nor do the digests and treatises suffice. The digests themselves are becoming so bulky and expensive that aside from those of their individual states, few owners of private libraries can afford to buy and store them. Each added ten years brings, at the present rate, 24 or more great volumes of the American Decennial Digests. Even digests of the reports of any one of the larger and older States are becoming inconvenient because of their size. With the growth of the newer States, conditions everywhere will be similarly troublesome, if no assumption as to rate of reporting decisions is made than that the present rate continues. It can hardly be doubted, however, that it will be true in the future, as it has been in the past, that the rate of production will increase with the increase of population.

If we turn from the digests to the treatises and inquire what they have accomplished in the way of furnishing an effective summary the answer must be that the ordinary legal treatise is little more than a digest. In a narrow subject, or at a time when decisions are not numerous this method of treatment is not amiss. Such excellent treatises as Benjamin on Sale, and Gray on Perpetuities follow in the main the plan of briefly stating the facts of leading cases coupled with discriminating comments by the authors. In a larger field adherence to this method is more and more undesirable and indeed hardly possible.

As decisions have become more numerous the encyclopedias and most treatises vary the method by grouping under one heading numbers of decisions supposed to relate to states of fact substantially identical in their relevant facts. The reader here is no longer given the specific facts of the individual case. Trust must be placed not only in the industry of the author, but in his ability to determine identity in principle and to discriminate between what a court says and what a court actually does. Experience has shown that this trust can rarely be implicitly given. One great reason is that there is no adequate commercial return for the necessary industry and ability. This difficulty

might be remedied if the work of preparing treatises were subsidised as the work of the Restatement has been.

The Council of the American Law Institute carefully considered the respective merits of carefully prepared treatises and the plan actually adopted, and ultimately decided that increased clearness, brevity, consistency, uniformity and accessibility could best be achieved by putting the Restatement in the form of concise rules analogous to those in a carefully drawn statute, supplemented, however, by comment and illustrations that would preclude as far as possible doubts as to the exact meaning and effect of the rules.

It was of the essence of the plan that it should be a cooperative effort in which each statement should receive the careful thought of the body of experts, and later receive the approval of the Council and of the whole body of the Institute. Every sentence of the Restatement of Contracts has been prepared and considered in this way. In the more discursive and necessarily more bulky form of a treatise, such careful consideration of each sentence and, indeed, each word would be more difficult. Moreover, a treatise could hardly fail to continue the existing practice of citing decisions *pro* and *con* and enter into arguments as to their respective merits. It seemed that the Restatement would be more likely to achieve an authority of its own that would to some extent, at least, free courts from part of the troublesome weighing cases and arguments if exact rules were clearly stated without argument. Those who have prepared the Restatement have had arguments among themselves—hundreds of them. They believe it better to give the net results of their arguments than to present the arguments themselves with supporting authorities.

It cannot be contended that the existing and threatened difficulties that have been referred to can be wholly avoided. But the fact that ideal certainty, simplicity, and uniformity, cannot be obtained is no reason why as much should not be done toward securing these objects as is practicable.

Of course the utility of the method adopted depends in large measure on the confidence that men can have in the character of the work, and the only way to give them confidence is to make the work worthy of it. This can be fully established only by actual experience in the use of the Restatement, for sound judgment, as well as industry, is essential to the success of the enterprise. It is only fitting to say here that no pains have been spared and that the work is based not on the industry or judgment of a single man. The value of the cooperation of those who have worked with the Reporter cannot be too highly emphasized. Our experience has shown that an individual in attempting such work without the assistance of expert criticism could not fail to fall into ambiguities of language and, indeed, actual mistakes, aside from errors of judgment. If the enterprise proves creditable, the credit belongs not only to an entire group of experts acting under the supervision of a Director, who has been willing to let nothing pass without most careful and intelligent scrutiny, but to the distinguished judges and lawyers in the Council who have given largely of their time to the consideration of preliminary and tentative drafts. Their faith in the importance and desirability of the effort should impart some confidence to the Bench and Bar to whom the final result is submitted.

The most ardent believers in the Restatement cannot expect that courts will readily give up well established rules in their own jurisprudence, because the Restatement of the Institute lays down a different rule. But when one observes how even questionable statements in legal encyclopedias or textbooks are often copied by the courts of one jurisdiction after another, it seems plain that the rules of the Institute's Restatement, which have been drawn with a degree of care and cooperation of learned persons, impossible in the production of encyclopedias and treatises, should have much greater currency.

SAMUEL WILLISTON.

STATEMENT BY JAMES BYRNE, VICE-PRESIDENT OF AMERICAN LAW INSTITUTE

THE American Law Institute is about to publish its Restatement of the law of Contracts; and it is engaged on the restatements of Conflict of Laws, Agency, Torts, Business Associations, Property and Trusts.

People ask now and then, when they first hear what the American Law Institute is trying to do, why it was not done long ago. "Surely," they say, "those who founded the Institute ten years ago were not the first to see the value of the work."

They are quite right.

In 1889, Mr. James C. Carter, one of the most scholarly and distinguished lawyers that the American Bar has known, declared the value was "priceless." I quote from an address on "The Provinces of the Written and the Unwritten Law" delivered by him before the Virginia Bar Association:

> "A statement of the whole body of the law in scientific language and in a concise and systematic form is precisely what is understood by a good digest; and such a work at once full, precise and correct would be of priceless value. It would refresh the failing memory, reproduce in the mind its forgotten acquisitions, exhibit the body of the law so as to enable a view to be had of the whole and of the relation of the several parts and tend to establish and make familiar a uniform nomenclature. * * * Such a work, well executed, would be the *vade mecum* of every lawyer and judge. It would be the one indispensable tool of his art. * * * It may cost prodigious labor. * * *"

"A statement of the whole body of the law in scientific language and in a concise and systematic form * * * at once full, precise and correct," is an exact description of the statement which the American Law Institute hopes to make. The day is doubtless far distant when the Institute will complete this great work, but complete it it will—either the Institute or some successor.

Mr. Carter speaks of the statement as a digest. It is not what is commonly called a digest, but call

it what you will, it is a statement which Mr. Carter says will be to every lawyer and judge "the one indispensable tool of his art."

But Mr. Carter did more than give high praise to what we call the Restatement. He told also how to make it as nearly perfect as possible. He did this, however, not by talking about restatements, but by attacking the Field Code. That code, he says, is the work of one man or at most three. Of course it is defective. If you wish to make a good code, a code as nearly perfect as possible, the best that the wit of man can devise, here is the way to go about it:

> "The talents or learning which cannot be found in one man or three men might be enlisted in the work. The masters in each of the different branches of the law might be called to the task, and the combined result of their labors might be submitted to the judges elected by the people for their suggestions and criticism, and a small selected number of the wisest and best might be appointed for the task of final revision and compilation."

There are the directions, changed only to bring in more workers and to insure even greater thoroughness, which the American Law Institute has followed in the making of the restatements upon which it is now engaged and of the Restatement of Contracts which it is about to publish.

Professor Williston, who has written the main part of it, and Professor Corbin, who has written certain chapters, are "the masters" in Contracts who were called to the task of drafting the Restatement of it. The "small selected number of the wisest and best" are the advisers to whom the masters have submitted their drafts from first to last for criticism and suggestion and for what other help the advisers could give. And the "combined result" of the labor of the masters and their advisers has been submitted at every stage for examination, discussion and approval, not to judges alone but to lawyers and judges composing the council and membership of the Institute and to hundreds of others.

Why was the great speech of Mr. Carter followed by no immediate action? Weariness after the long fight on codification is explanation enough for delay until the new century. But why was nothing done then? New law reports in 1902 may not have contained as many pages as Sir John Salmond said they did in 1922—175,000 pages; but they contained enough, it would seem, to frighten the profession. Sir John Salmond's explanation is that the lawyers in America were becoming used to law books great in number and vast in size. "Their susceptibilities," he concludes, "were deadened and their fears allayed by long familiarity."

But whatever the cause of the previous delay the American Law Institute did get organized in 1922 and since then the judges, the professors of law and practicing lawyers have worked together with infinite care, labor and enthusiasm.

In the ten years, however, that have passed since the Law Institute was organized at least 1,500,000 more pages of law reports have been printed and, if we continue at the rate of 1922, in twenty years from now there will be 3,500,000 and by the end of the century nearly 10,000,000, more pages than there are today.

What shall we do about it? Adopt the principle of "judicial impressionism," make the "individual sense of justice in law as well as in morals the sole criterion of right and wrong"; follow the example of *les bons juges* that Justice Cardozo talks to us about "who asked themselves in every instance what in the circumstances before them a good man would wish to do and rendered judgment accordingly?" If we are not willing to do that, because with Justice Cardozo we approve the principle that the judge should "draw his inspiration from the solutions consecrated by the doctrine of the learned and the jurisprudence of the courts," ought not we all to help as best we can the American Law Institute in its work of bringing these solutions and that doctrine and the jurisprudence of the courts most easily within the grasp of the bench and the bar?

JAMES BYRNE.

STATEMENT BY GEORGE WHARTON PEPPER, MEMBER OF COUNCIL OF AMERICAN LAW INSTITUTE

THE American Law Institute is endeavoring to salvage American Law. "Salvage" is a strong word but not too strong to use in this connection. If the Institute's organized effort had not been made, there can be little doubt that increasing confusion and growing conflict of authority would have had their climax in chaos. Separate provincial systems of law might have been developed, much as asteroids are thrown off in times of sidereal calamity. But there would have been no body of law of nation-wide authority notwithstanding the ever-increasing need for it.

In the salvage work of the Institute there is most satisfactory cooperation between the three arms of the profession—the bench, the bar and the school. Each of these has an indispensable contribution to make. Until in any country the work of bench and bar has "passed through the school" it necessarily remains an undigested mass. As long as judges and practicing lawyers regard the teacher of law as merely an amiable doctrinaire the disintegration of law goes merrily on. As soon as the three men welcome one another as colleagues, cooperation begins and the forces of disintegration are checked.

It will be fair enough to test the value of the Institute by appraising the Restatements as they appear. It must be recognized, however, that the united effort which produces the Restatements is in itself a thing of value. I do not believe that there really can be such a thing as an American Bar unless there is a body of American law which can be the common heritage of American lawyers. In that event, and in that only, will its development become a professional responsibility and its defence a matter of professional pride.

The work of the Institute is not only a force making for cooperation between bench, bar and school but furnishes also a basis of fellowship with each State Bar Association. The task of comparing

a Restatement with the law of a given state and the indication of all points of agreement and difference is essentially a local task. Not only can it best be done by a home group of judges, practitioners and teachers, but the doing of it by such a group develops in each state a like professional unity. I believe that a State Bar Association which seriously accepts the responsibility of annotating the Institute's Restatements will have found for itself a new and compelling reason for its own existence.

I have watched with intense interest the evolution of the Restatement of the Law of Contracts. I have seen a fine piece of work done by men from everywhere who at first were strangers and are now colleagues. I have noted a steady increase in the reciprocal respect of each arm of the profession for the others. In the state with which I am most familiar (Pennsylvania) I have seen the Bar Association organizing and financing a cooperating committee, at first as a matter of duty and later coming to regard its work with pride and as an essential part of the Association's activity. And within the limits of the cooperating committee I have seen a growing sense of professional brotherhood and an increasing devotion to the service of the profession. In view of this personal experience it is not surprising that I look upon the support of the Institute as a primary professional obligation.

GEORGE WHARTON PEPPER.

INSTITUTE PROGRESS TO DATE, BY CHARLES BERRY HOWLAND AND HERBERT F. GOODRICH

WITH the publication this month of the final volumes of the Restatement of the Law of Contracts, another milestone in the work of the American Law Institute has been passed. The bench and bar of the country are now presented with the first complete subject in the tremendous task of the restatement of the common law. And of equal significance with this publication, which comes after nine years of preparation, is the announcement that the other subjects in which restatement will follow are rapidly nearing completion. Agency is to be presented for final consideration at the annual meeting of the Institute next May and Conflict of Laws is nearing completion. The other subjects will follow in prompt succession, so that we may expect them from now on in regular sequence.

Of what advantage is the Restatement to the practicing lawyer? Does it belong solely in the libraries of our law schools or is it also necessary to the busy practitioner whose days are spent in conference with clients or in the strife of the court room? Such questions, once frequently asked when the Institute's work was first being presented to the profession, are now seldom heard when so many active lawyers daily turn to the latest drafts of the Restatement, and when scarcely a new volume of state or federal reports appears from the presses which does not contain cases in which appellate courts have cited the Restatement as authority for their decisions. One reason, and one alone *can* compel this use; *has* compelled it. That reason is simplicity itself. The Restatement represents the considered view of the leading legal minds in the United States, finally achieved by infinite study and constant consultation.

The two chief defects in American law, it has been said, are its uncertainty and its complexity. The purpose of the American Law Institute, through its Restatement, is "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to carry on scholarly and scientific legal work." In his address before the annual meeting of the Institute in 1931, Chief Justice Hughes said: "Your endeavor is to provide a helpful, if not absolutely authoritative, restatement of the law and thus to diminish the area of ignorance and futile controversy." How well this is being done by the Institute is best attested by the rapidly increasing reference to and reliance upon the Restatement by what, at long last, must be the arbiter for every lawyer—the appellate court.

In one of its publications, the Institute has listed the cases in which the courts have cited various sections of the Restatement. The list is extensive and impressive. When we remember that the first completed Restatement (Contracts) has only appeared this month and that, therefore, the courts have of necessity had available to them only the tentative and uncompleted drafts of the Restatement, we realize the importance already attributed to them, and the much greater use which will be made of them as they appear in final form.

The Restatement does not attempt to make new law. It does not purport to have the force or character of enacted legislation. It depends for its validity entirely upon the sanction given it by the bench and bar. And this sanction comes solely because it presents the carefully considered and matured opinions of the foremost legal scholars in the country available for the task in the given field of law, aided, corrected, revised and completed with the assistance of the membership of the Institute and the Cooperating Committees of the State Bar Associations, composed of the ablest judges, lawyers and law teachers in the country.

What was the genesis of the Institute? Who decided what work was to be done and who should do it? Our ablest judges and lawyers are busy men, already overborne with their daily labors. Would those best fitted for the task devote a large portion of their time to such a work? Nothing short of the most capable minds, doing their most capable work, could command the confidence and respect of the critical attention of the profession. The answer has been given by the profession itself.

Foundation and Purpose

The American Law Institute was founded in 1923 at a meeting in Washington, D. C., called to consider the report of a voluntary committee, headed by Elihu Root, whose membership was a veritable roll-call of the leaders of American legal opinion. This committee had been studying for nearly a year defects in our law, and ways and means of reducing them by action from within the profession itself.

The purpose of the Institute is to produce a clear and accurate expression of the common law

in the simplest terms. When we consider the forty-eight stations devoted to somewhat inexpert experiments upon the body politic, it is small wonder that we have strangely differing operations and a wide variety of results. Rules of law developed in these many jurisdictions, all deriving from the same original source and yet all varying in small or great degree, have given rise to confusion and conflict increasing, rather than decreasing, day by day. Not only to clarify and simplify, but to select the *best* statement of the law when there is a conflict between jurisdictions, is the problem of the Institute in its Restatement.

The work had not long proceeded before it became apparent that one of the great difficulties in the production of any restatement of the law was not so much the conflicting decisions between courts as the selection of the terminology, at once clear and adequate, not merely for the expression of the law of any particular subject but for the restatement of all subjects. The importance of a careful solution of this problem, the magnitude of the subjects involved and the care necessary in the study and correlation of the existing law were tremendous tasks. After nine years the first completed subject has appeared. But since the work in the six other fields of law, (Agency, Business Associations, Conflict of Laws, Property, Torts and Trusts), has been proceeding simultaneously, the subsequent volumes of the Restatement will hereafter appear in prompt order.

The Restatement is not intended to be developed into a code or enacted into statute by legislatures. The Institute was founded to preserve the common law system of developing law through the judicial determination of actual cases. In some instances, however, the law of various jurisdictions is in disagreement. In such cases the Restatement has made a choice between two positions based, not upon the consensus of jurisdictions but upon the consensus of the best legal thought on the subject.

Organization and Membership of the Institute

The Institute is composed of two classes of members—elected members and official members. Official members are the Justices of the Supreme Court of the United States, Senior Judges of the Federal Circuit Courts of Appeals, the Chief Justices of the highest courts of the several States and the District of Columbia, the president and members of the executive committee of the American Bar Association, the presidents of the State bar associations, the president of the National Conference of Commissioners on Uniform State Laws, the presidents of certain learned legal societies such as the American Society of International Law, and the deans of the member schools of the Association of American Law Schools.

Elected members are chosen upon nomination by a member, recommendation by a Committee on Membership and election by the Council of the Institute. The articles of association provide for 750 elected members of which there are now 699. The membership is nationwide. The Institute has no dues. The obligations of a member are (1) to assist in the Institute's project by examination of the Restatement and submission by the member of such suggestions for its improvement as he may be able to offer, and (2) to attend the Annual Meetings of the Institute. Absence from Annual Meetings for two consecutive years operates as a resignation from membership.

The executive body of the Institute is a Council composed of thirty-three members. The members of the Council are elected by the Institute and hold office for nine years, one-third retiring every three years. The executive officer of the Institute is the Director, who is also secretary and executive officer of the Council and ex-officio chairman of the legal staff.

Financial Support

The Council of the Institute, in laying its project before the Carnegie Corporation in March, 1923, stated that it had no desire to minimize the labor, time or expense involved in the restatement of the law. "As a scientific, constructive legal work," it said, "there has been nothing to compare with it, not even the work of framing the Napoleonic Code, since, under the direction of Justinian, the Roman Law was given systematic expression." The Council said that unless the work could be undertaken in a large and serious way it should not be undertaken at all. It therefore asked the Carnegie Corporation to consider making a sufficient appropriation to guarantee the continuance of the work for ten years, expressing the opinion that that period should be sufficient to enable the Institute to issue Restatements covering a considerable portion of the more important branches of the law. The Carnegie Corporation, which has always manifested profound interest in projects which closely involved the social or governmental welfare of the country, responded most generously to this application by appropriating to the use of the Institute the sum of $1,075,000, payment to be distributed over a period of ten years. In addition, the Corporation has made further funds available to the Institute as they have become necessary to the Institute's further work.

In 1930 a Special Committee, appointed by the Board of Trustees of the Carnegie Corporation, reported to the Board that in its "Opinion the Corporation has good reason for looking with satisfaction upon the progress which the Institute has made in its work of the Restatement of the law, and is wise in wishing to continue the part of the Corporation toward the accomplishment of that great and important work. We believe that the American Law Institute is doing the work economically and efficiently."

In the field of Criminal Law and Procedure, the only project wherein the Institute has attempted to prepare a Code consisting of proposed statutes and Court rules, the work has been carried on through the generosity of the Laura Spelman Rockefeller Memorial which, since March 1, 1925, has donated $147,000 for this purpose.

Subjects Embraced by the Restatement

The work of actual preparation of the text of each Restatement and the responsibility therefor is in each instance in the hands of a Reporter chosen because he is the ablest available in a given field. At the present time the Subjects in which Restatement is going forward are as follows:

Agency—Professor Warren A. Seavey, Harvard Law School, Reporter (formerly Floyd W. Mechem).

Business Associations, including corporations and partnerships—William Draper Lewis, Director of the Institute, Reporter.

Conflict of Laws—Professor Joseph H. Beale, Harvard Law School, Reporter.

Contracts (now completed)—Professor Samuel Williston, Harvard Law School, Reporter for the Subject; Professor Arthur L. Corbin, Yale Law School, Reporter for Specific Chapters in Contracts.

Property—Professor Richard R. Powell, Columbia University Law School, Reporter (formerly Harry A. Bigelow).

Torts—Professor Francis H. Bohlen, University of Pennsylvania Law School, Reporter for the Subject; Professor Edward S. Thurston, Harvard Law School, Reporter for Specific Chapters in Torts.

Trusts—Professor Austin W. Scott, Harvard Law School, Reporter.

Work in Criminal Law and Procedure

In one field of the law only has the Institute attempted to prepare a Model Code. That is its Code of Criminal Procedure. The administration of criminal law has been the subject of increasingly bitter attack in this country in recent years. Admittedly, much of our Criminal Procedure is an outmoded and cumbersome relic of earlier days, sadly in need of sweeping revision. Therefore, the Institute undertook the task. Any reform in this subject must necessarily take the form of a statute, since the subject matter is not one of substantive law, as is the case with the subjects of the Restatement. The Reporters chosen for this subject were William E. Mikell and Edwin R. Keedy, both of the University of Pennsylvania. They were assisted by a group of Advisers consisting of Judges from both trial and appellate courts, practicing lawyers of experience in both prosecution and defense in criminal cases, and teachers of Criminal Law and Criminal Procedure from leading law schools. The completed Code was officially adopted by the Institute at its annual meeting in May, 1930. Since that time many sections from the Code have already been adopted by the legislatures of a large number of states, and many more now have it under consideration.

Following the completion of the Code of Criminal Procedure, the Reporters and their advisory committees have completed four model statutes in the field of substantive Criminal Law. These are as follows:

(1) Summoning Witnesses in One State to Testify in Another State (1931);

(2) Right to Comment on Fact Defendant Did Not Testify (1931);

(3) Killing and Wounding to Effect Arrest (1931);

(4) An Act Relating to Double Jeopardy (1932).

Publication and Distribution

Members of the legal profession have been receiving tentative drafts of the Restatement in various subjects from time to time as they were submitted for comment and revision. Beginning with this year, however, completed portions of the Restatement are appearing. For the publication and distribution of the finished volumes an association has been formed composed of the Institute, the West Publishing Company of St. Paul, Minn., and the Lawyers' Cooperative Publishing Company of Rochester, N. Y. It will be known as the American Law Institute Publishers, and it will publish and market both the Restatement and the local annotations prepared under the auspices of the various bar association committees. Through the American Law Institute Publishers the work of the Institute will be available to the profession through the regular channels.

State Annotations

The most important work supplementary to the preparation of the Restatement itself is the preparation of the annotations thereto by state and local bar associations. The Restatement sets forth the common law principles in clear and concise language. But for the judge or lawyer it is necessary, in dealing with a particular problem, to know both the previous expressions of a court in his own State upon a subject and whether there is any statute in his State which governs the point involved. More than forty states already have Cooperating Committees, sponsored by the State Bar Association, or other local organization, which have been engaged in the all-important and arduous task of annotating each section of the Restatement as it appears. In many of the States the work is so far advanced and so promptly done that with the publication of the second volume of the Restatement of the law of Contracts the State annotation thereto has appeared simultaneously. In many others the work is not far behind. At the same time, the work in annotating other subjects proceeds apace with the appearance of the tentative sections of the Restatement. In a few States, no agency has yet undertaken the local annotations, a matter which the Institute of course cannot itself undertake, although it will gladly cooperate in any way possible with such local committees.

It is obvious that the Restatement should be accompanied by a carefully prepared statement of the local law, in which each proposition as it appears in the Restatement is shown with relation to the local decisions and statutes. If this is done, the reader can tell almost at a glance whether the statutes and decisions in his State are consistent with the Restatement, whether the point is undecided, or whether his own court or legislature has expressed a rule contrary to that of the Restatement. The annotations also fill another important function by explaining apparent differences between the Restatement and local rules where the two are consistent in result but differ in the way of expressing a result.

From the practical standpoint, no other single factor is as vital to the utility of the Restatement as these state annotations. The Institute will give every aid within its power to state and local bar committees or to law schools which will undertake to cooperate in this work. Through the American Law Institute Publishers it will arrange for publication of the completed annotations. But the preparation of those annotations must rest with local organizations themselves, more of whom are undertaking the task all of the time, now that the work of producing the various branches of the Restatement has so far advanced.

DEPARTMENT OF CURRENT LEGISLATION

Some Recent Statutory Changes in California Rules of Civil Liability

By Fred B. Wood and Joseph W. Paulucci
Legislative Counsel State of California

THERE have been some interesting changes in the California statutes in recent years relating to personal liability of a civil nature. New liabilities arising out of the ownership or operation of motor vehicles have been created; the rule of proportional liability of stockholders of corporations, which has existed since the adoption of the first constitution of the state in 1849, has been changed; and even the time honored rule of the common law that "every dog is entitled to one bite" has been abrogated. While this article does not purport to be an exhaustive survey of all of the changes in statute law relating to civil liability, the following comments may serve to indicate how changing social and economic conditions are reflected in statute law.

Motor Vehicle Liability

In 1929,[1] the owner of a motor vehicle was made liable for damages resulting from the negligent operation thereof "in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner. . . ." In cases other than principal and agent claims arising out of any one accident were limited to $10,000 for deaths or personal injuries and $1,000 for damages to property. In such cases recourse must first be had against the operator if he can be served, and the owner is subrogated to the plaintiff's rights against the operator if the owner has to pay.

At the same session, section 1714½ was added to the Civil Code providing that the state and political subdivisions are liable for damages arising out of the negligent operation of motor vehicles which they own. By the same section the state and political subdivisions are empowered to insure against such liability and the premiums for such insurance are made a charge against the general fund of the state or political subdivision as the case may be.

The first of these sections creates a new liability. Prior to its enactment recovery was possible only upon the basis of *respondeat superior*. The principal could escape by showing that the agent was acting outside of the scope of his agency, and in many cases where the relationship of principal and agent might reasonably have been assumed the principal could show that the relationship did not, in fact, exist. Under the present law, when the negligence of the operator is shown, all that it is necessary to prove in addition is the express or implied permission of the owner.

The enactment of Section 1714½ of the Civil Code relating to the liability of the state or political subdivisions for the negligent operation of motor vehicles has cleared up a somewhat unsettled situation. No distinction is made by the code section between cases where the state or subdivision is acting in a "governmental" or in a "proprietary" capacity. The section differs from Section 1714¼ of the Civil Code, in that in order to recover against the state or political subdivision it must be shown that the operator was "acting within the scope of his office, agency or employment."

The liability of the owner, operator or person responsible for the operation of a motor vehicle for damages arising out of injuries to a guest has given rise to some interesting legislation in California. Prior to 1929 a guest could recover for injuries arising out of the negligent operation of the motor vehicle in which he was riding.[2] In 1929, the legislature[3] provided that a guest riding in a motor vehicle should have no right of recovery in such cases except when the injury proximately resulted from the intoxication, wilful misconduct or gross negligence of the owner, driver, or person in charge of the vehicle. The statute does not affect the guest's rights against other persons causing an injury to him.

No particular difficulties arose as to cases rising out of wilful misconduct or intoxication. Upon the question of gross negligence, however, a difficulty presented itself. While the California courts recognize degrees of negligence,[4] whether or not an act of omission constitutes one or another of such degrees of negligence is a question of fact. The result is that if the plaintiff alleges that the defendant was grossly negligent he states a cause of action. In *Malone v. Clemow*,[5] the plaintiff alleged the specific acts and also alleged that they were done in a grossly negligent manner. The court held that this was sufficient and intimated that even without such specification the complaint would have been good. As a consequence, all that the statute accomplished so far as negligence in guest cases is concerned was to require the insertion of an additional word in the complaint in such a case.

Following the decision of *Malone v. Clemow*, the legislature in 1931 deleted the provision relating to gross negligence. In order to recover under the present statute the plaintiff must show intoxication or wilful misconduct as the proximate cause of his injury. Consequently, no matter how negligent the defendant may be the plaintiff cannot recover unless he can also show wilful misconduct or intoxication. In *Helme v. Great Western Milling Co.*[6] the court said:

"'Wilful misconduct' means something different from and more than negligence, however gross . . . To constitute wilful misconduct there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge

1. Civil Code of California, Section 1714¼.

2. *Finnegan v. Giffen*, 89 Cal. App. 702.
3. Stats. 1929, p. 1580, adding Sec. 141¾ to the California Vehicle Act.
4. *Krause v. Rarity*, 210 Cal. 644.
5. 111 Cal. App. 13.
6. 43 Cal. App. 416.

of the peril to be apprehended from the failure to act coupled with a conscious failure to act to the end of averting injury."

This distinction is apparent but it is obvious that many hair-line decisions will have to be made. Whether or not a given act constitutes "wilful misconduct" for which the defendant is liable or some degree of negligence for which he is not liable may, in many cases, be a question which would tax the ingenuity of a mediaeval scholastic. In the final analysis, it would seem to be a question of fact upon which the decision of the trier of fact is final. The jury must find what the state of mind and mental processes of the defendant were. Obviously no one can possibly know what another's mental processes are except upon the testimony of the other person; and it is equally obvious that such testimony should not be conclusive. The jury should be at liberty to consider all of the facts of the case and disregard the testimony of defendant if it see fit.

The result seems to be that the elimination of the element of gross negligence has not, as a practical matter, given the defendant any additional safeguard. The plaintiff may allege wilful misconduct instead of gross negligence and present his facts to the jury. It is inevitable that upon the same state of facts one jury might hold defendant liable and another jury in a like situation render an opposite verdict. There seems to be no method of defining wilful misconduct in a statute, since it always involves a question of fact relative to the state of mind of the defendant. It is plain, however, that the legislature wishes to relieve the defendant except in case where his fault is extreme. Under the present statute the plaintiff may put the defendant to proof regardless of the quantum of his fault and the defendant must rely upon the common sense of the jury. That the jury may make a mistake is, of course, an ever present unavoidable danger, but if there is to be any liability at all upon the part of a defendant to a guest for wilful misconduct or for negligence, it seems unavoidable that considerable latitude be accorded the triers of the facts.

California has no compulsory automobile insurance law. By the addition of Section 73(g) of the California Vehicle Act in 1929,[7] however, it was provided that in the event a judgment in excess of $100 for damages on account of personal injury or property damage resulting from the ownership or operation of a motor vehicle remains unsatisfied for fifteen days the operator's or chauffeur's license shall be suspended until the judgment is satisfied and proof of financial responsibility is given. Proof of financial responsibility may be made by presenting an insurance policy, surety bond, or receipt showing a cash deposit of $10,000 with the state treasurer.[8]

In the case of *In re Lindley*,[9] section 73(g) of the vehicle act was declared unconstitutional on the ground that it created an arbitrary and unreasonable classification. Subsequently in *Watson v. Division of Motor Vehicles*,[10] the Supreme Court of the state ruled contra to the *Lindley* case and declared the section constitutional. In the *Watson* case the court adverted to the fact that compulsory automobile insurance statutes had been upheld in other jurisdictions and seemed to indicate that there was nothing constitutionally wrong with such legislation. So far as the decision in the *Watson* case is concerned, there seems to be no reason that compulsory insurance of *all* automobile drivers might not be required. However, it has been the policy of the legislature not to penalize the careful driver, not to require insurance of all but to increase the responsibility of each, weeding out those who demonstrate lack of capacity or of disposition to meet that responsibility.

Liability for Ownership of Biting Dog

The time-honored rule that "every dog is allowed one bite" has been abrogated in California.[11] It is provided that the owner of any dog is liable for damages to any person who may be bitten by the dog when the person is in a public place, or lawfully within or upon private property, regardless of the owner's prior knowledge of the dog's viciousness. This takes such cases out of the field of negligence, since under the statute the owner of a previously innocent canine would be liable for damage inflicted by it to the same extent as the owner of a dog whose vicious propensities were previously known to its owner. Today, it is felt that there is greater need, and occasion, than formerly, to protect the public from the acts of a vicious animal, especially persons (such as messengers, deliverymen and inspectors) who have occasion rightfully to visit the owner's premises.

No distinction is made between licensed and unlicensed dogs; the sole issue, assuming that damage has been proved, being "ownership." In case the dog is licensed it may well be assumed that the person obtaining the license is the "owner," regardless of whether he possesses a bill of sale or other indicia of title. In cases where there is no license, the question of ownership may cause some difficulty. The mere fact that a person harbors and cares for a dog does not necessarily indicate ownership thereof, in the sense that the person has acquired a legal title to the animal. As the statute now stands "ownership" is a question of fact for the court or jury. No reported decision directly involving the statute has been rendered; but there seems to be no constitutional question involved. It may be anticipated, however, that cases may arise where the question of ownership will cause some difficulty.

Stockholders' Liability

The 1931 session of the California Legislature marked the passing of the peculiar proportional liability of stockholders of business corporations which has existed in the state since its formation in 1849. The first constitution of California contained the following:

"Each stockholder of a corporation or joint-stock association shall be individually and personally liable for his proportion of all its debts and liabilities."[12]

Under this section it was held that one creditor might collect from one stockholder the entire amount of the stockholders' liability on all corporate debts, leaving the stockholder to seek contribution from his co-stockholders.[13] There was also an ambiguity in the use of the word "all," as it could be construed to include debts and liabilities contracted before or after the particular stockholder had any interest in the corporation.

The present constitution, as originally adopted, provided that

"Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted and incurred, during the time he was a stockholder, as the amount of stock or

7. Stats. 1929, Ch. 258, p. 558.
8. Section 86½, California Vehicle Act, added by Stats. 1929, Ch. 259, p. 562.
9. 108 Cal. App. 258.
10. 212 Cal. 279.
11. Stats. 1931, Ch. 503, p. 1095.
12. Art. IV, Sec. 36, Const. of 1849.
13. *Larrabee* v. *Baldwin*, 85 Cal. 155.

shares owned by him bears to the whole of the subscribed capital stock, or shares of the corporation or association."[14]

By thus recasting the section it was made apparent that the liability of a stockholder extended only to those obligations incurred while he had an interest in the corporation. The other point was solved in the decision of *Gardiner v. Bank of Napa*,[15] holding that a creditor might recover from a stockholder only the amount of the stockholder's proportional liability on the creditor's particular obligation. At a time when the number of stockholders in a corporation were relatively few in number such an interpretation was probably sound. With the development of the corporate organization of business enterprise and the concomitant widespread distribution of stock among a multitude of stockholders, the practical utility of "proportional liability" declined. An individual with a claim of $1000 against a corporation the stock of which was held by 1000 shareholders would be forced to bring 1000 actions, or at least serve 1000 defendants in order to recover the full amount of his claim against the corporation from the stockholders.

The practical utility of the constitutional provision was further lessened by the decision in *Chambers v. Farnham*,[16] which declared that the liability imposed upon the stockholders was a liability created by law within the meaning of Section 359 of the Code of Civil Procedure, which provided that an action on such liability must be commenced within three years after the liability was created. In this case the court held that the liability was "created" when the contract was consummated rather than when the breach occurred. The result was that in relation to long-term obligations (over three years) the remedy of the creditor against the stockholder was not available.

With these considerations in mind it is not surprising that opposition to the constitutional provision developed. It was believed that the existence of proportional liability of stockholders acted as a deterrent to investment in the stock of California corporations by the investing public, and that a greater benefit would accrue to the state in general by encouraging investment in corporate stock than would accrue by protecting the creditors of corporations. The fact that nowadays the average stockholder in a large corporation exercises little or no control over its operations, probably gave added emphasis to this view. Consequently, in 1928, an amendment to Art. XII Section 3 was adopted by the voters providing that the proportionate liability should not apply to stockholders in a corporation using as the last word of its corporate name the word "Limited" or its abbreviation "Ltd.," and that the liability of stockholders of such corporations should be fixed by the legislature.

The legislature promptly responded, in 1929, by enacting Sec. 322a of the Civil Code which provided that stockholders of a "Limited" corporation should not be personally liable for the corporation's debts. The section excepted banks, insurance companies and building and loan associations, as to which Section 322 of the Civil Code (the codification of the general provisions of Art. XII, Sec. 3) should apply.

There was no great rush on the part of corporations already organized to take advantage of the new provision. The amendment of the section of the constitution did, however, pave the way for its repeal and it was repealed by the people in 1930. At the 1931 session of the legislature a revision of the general corporation law, sponsored by the State Bar of California, was enacted[17] which eliminated personal liability of stockholders of all corporations except those as to which a special provision might be made applicable.

At the same session it became necessary to make certain changes relating to the liability of stockholders in particular types of corporations. A statute similar to the "double liability" clause of the National Bank Act was enacted applying the same rule of liability to state banks;[18] and a similar provision appeared in the revision of the building and loan association law.[19] Members of non-profit corporations are exempt from personal liability;[20] and the liability of stockholders or members of non-profit marketing associations is limited to the unpaid balance of the stock subscription or membership fee.[21] There is no special provision relating to the liability of stockholders in insurance corporations.

While it is true that under the present system some consideration needs to be given to the type of corporation in order to ascertain whether any personal liability of stockholders exists and that for this reason the question is more complex than under the former system when stockholders of all corporations were proportionally liable, the California corporation law in this respect is brought into conformity with that of most of the other states.

Innkeeper's Liability

The liability of an innkeeper for the personal property of a guest received into his care was well known to the common law. The Civil Code of California, Section 1859, as originally enacted, was simply a declaration of the common law rule. In the case of *Churchill v. Pacific Improvement Company*,[22] it was held that the liability of an innkeeper was not a liability "created by statute" within the meaning of Section 338 of the Code of Civil Procedure (which would have permitted an action to be commenced within three years), but came within the provisions of Section 339 of the Code of Civil Procedure which provides that an action upon an obligation not founded upon an instrument in writing must be commenced within two years. The court held that the Civil Code section was merely declaratory of the common law and that even though section 1859 of the Civil Code did not exist, the liability would neverthless be the same and that consequently the statute did not "create" the liability but only declared it. In 1931, Section 1859 was extended to apply to keepers of furnished apartments and furnished bungalow courts.[23]

It is interesting to speculate as to what statute of limitations applies to the amendment. It might be difficult to establish that the liability of a furnished bungalow court keeper was known to the common law, and if it was not, the liability is a liability created by statute and the period in which an action may be commenced is three years. This would result in the somewhat unusual situation of having a different statute of limitations apply to different parts of the same section. There is, of course, nothing inherently wrong with such a result. To avoid it, a court would have either to overrule the decision in the *Churchill* case, and declare the period of limitations in all cases within the section to be three years, or to declare the liability of

(*Continued on page 786*)

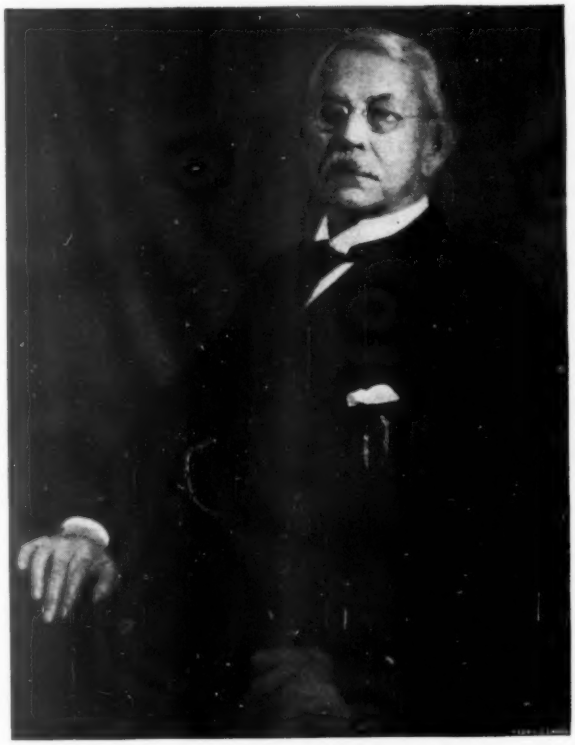
14. Art. XII, Sec. 3, Const. of 1879.
15. 160 Cal. 577, 177 Pac. 667.
16. 182 Cal. 191, 187 Pac. 739.
17. Stats. 1931, Ch. 862, p. 1762.
18. Stats. 1931, Ch. 196, p. 338.
19. Stats. 1931, Ch. 269, p. 483.
20. Stats. 1931, Ch. 871, p. 1847.
21. Stats. 1931, Ch. 870, p. 1840.
22. 96 Cal. 490.
23. Stats. 1931, Ch. 1190, p. 2501.

HENRY ST. GEORGE TUCKER, 1853-1932*

President, American Bar Association, 1904-5

HENRY ST. GEORGE TUCKER died at his home, Col Alto, Lexington, Virginia, July 23, 1932, in the eightieth year of his age. He is survived by his widow, Mrs. Mary J. Williams Tucker, and six children by his first marriage: John Randolph Tucker of the Richmond Bar, Mrs. Rosa Johnston Mason, Major Albert S. J. Tucker, Mrs. Laura Powell Fletcher, Harry St. George Tucker, Jr., and Mrs. Henrietta Preston White.

He was born April 5th, 1853, at Winchester, Virginia, a son of John Randolph Tucker and Laura Powell Tucker. He was educated at the College of Washington and Lee, Lexington, Virginia, at which college his father, John Randolph Tucker, late Attorney General of Virginia, was professor of law. He graduated from that college with high honors in letters and in law in 1876 and began the practice of his profession at Staunton, Virginia.



HENRY ST. GEORGE TUCKER

Mr. Tucker was the fourth in direct line who served in the National Congress as representative from Virginia. His great-grandfather, St. George Tucker, who came to this country from Bermuda in 1752, served in the first two congresses under the Constitution of the United States, and was a judge of the general court of Virginia in 1788 and subsequently a professor of law, succeeding Chancellor Wythe, in William and Mary College.

Soon after beginning the practice of the law Mr. Tucker became interested in public affairs and for thirty years and more continued to take an active part in the political life of his State. It is no exaggeration to say that the record of his public life is most admirable, and a rather rare one. He served for many years in Congress as representative of the 10th Congressional District of Virginia. While Mr. Tucker was serving in Congress during his last period the salaries of members of Congress were raised to take effect at once, but Mr. Tucker, believing that Congressmen should not raise their own salaries without going before the people on such a proposition, refused to accept the raise in salary until he had been re-elected, and turned the money back into the treasury. In this he followed the example of his great-grandfather, St. George Tucker, who had done the same thing.

In his first congressional service Mr. Tucker adhered vigorously, as he did through life, to a strict construction of the constitution, on which by his studies he became an authority. It was in the Cleveland Congress of 1893 that the Wilson tariff bill was passed and "The Scholar in Politics," William L. Wilson, whose name it bears, had no more ardent supporter than young Tucker of Virginia. Two measures bearing Mr. Tucker's name as author passed in these congressional days. One wiped out the last of the federal election laws, so objectionable to the South, the other provided for popular election of United States Senators.

The Board of Trustees of Washington and Lee in 1897 elected William L. Wilson, retiring from President Cleveland's cabinet, president of the University. Mr. Tucker was a member of that board of trustees. About coincident with the appearance of President Wilson in Lexington was the death of John Randolph Tucker, professor of constitutional law. The board very appropriately elected Harry St. George Tucker to succeed his father. Following the death of President Wilson, Mr. Tucker served for a year as acting president.

For twenty years the life of Mr. Tucker was devoted very much to study, to writing, travel and to filling various duties to which he was called by the public. For a few years he taught as dean of the law school at George Washington University at Washington. In 1905 his legal acquirements were recognized by his being made president of the American Bar Association. The University of Mississippi and Columbia University conferred upon him the degree of Doctor of Laws.

The following extracts from a letter received from Mr. Hugh A. White, a distinguished lawyer of Lexington, Virginia, and one eminently qualified

*This Memorial to the late President of the Association, Hon. Henry St. George Tucker, was prepared by Mr. William L. Marbury, of Baltimore, Md., and read by him at the Fifty-fifth Annual Meeting of the Association, at Washington, D. C.

to make a correct estimate, will give some idea of Mr. Tucker's character as a public man and private citizen.

"Mr. Tucker was the soul of honor in politics and everything else. I participated in his many campaigns during a period of over forty years and have seen him tested and tried and he has never yielded an inch where it involved his political principles even though it would have been to his advantage to do so. In his campaign for Congress in 1896 when the Democratic Party went astray on the free silver question he could not stand for the free coinage of silver at 16 to 1, and although the nomination was in his hands if he would go before the Convention and announce that he would fight for free silver at 16 to 1, he refused to do so and lost the nomination.

* * *

"Mr. Tucker was no politician in the modern sense of that word. He was as simple as a child and resorted to no subterfuges or tricks to obtain political preferment. While he was in favor of parties in politics he was opposed to what is known as "machine politics." He believed that political organizations within his party were organized for the benefit of the whole party, and not for any part or fraction thereof. I recall one instance in particular when he was a candidate for Governor and could have had the nomination without contest, if he had indicated a willingness to surrender some of his independence, but he refused.

Mr. Tucker was an orator of ability and one of the most effective political speakers in the country. By his force of logic and apt illustration, he could sway an audience to his way of thinking. No man in my knowledge had, and held, the affections of the people more strongly than did Mr. Tucker. Mr. Tucker was a Jeffersonian Democrat and clung to the theory of strict construction of the United States Constitution, but he was a great admirer of Chief Justice Marshall, and I have heard him say that it was a wise providence at the time that we had both Jefferson and Marshall, that each balanced and neutralized the extremes of the other—that without either one we might never have had the strong and yet liberal government we have.

"As to the personal side of Mr. Tucker, he was the most lovable and charitable man I have ever known. He bore no malice, harbored no resentment against his political foes, however much he might hate or despise their political principles.

* * *

"He was the happiest man I ever knew, always bubbling over with humor and good feeling and this continued to the end. Neither political nor other adversities seemed to affect his good spirits and kindly feeling and interest in every one.

"His hospitality in his magnificent home was unbounded and this extended to all, rich and poor, high and low.

* * *

"He saw deeply into the feelings of the poor and sympathized with them. His charity will never be known. To my knowledge he spent hundreds of dollars each year in a quiet unostentatious way in helping the poor and those in need."

Mr. Tucker devoted a great deal of his time to reading and to the study of the Constitution of the United States in all its aspects. He was the author of two very interesting works entitled "Limitations on the Treaty-Making Power" and "Woman Suffrage by Constitutional Amendment," works which are well worthy of the most careful study of any student of Constitutional Law. The last mentioned book contains a chapter entitled "Meaning of Local Self-Government" which leaves little to be said on that most vitally important subject.

The most striking fact regarding Mr. Tucker is that he had a personality which combined two qualities which are seldom found united in a public man, viz: an inflexible firmness in adhering to his political convictions, a capacity to resist any temptation or pressure to abandon them, and on the other hand most charming manners and a personality which enlisted the sympathy and affection of all sorts and conditions of men. All this was coupled, throughout his life, to the end of his career, with the never failing cultivation of

"That spirit of merriment
Which bars a thousand harms
And lengthens life."

Some Recent Statutory Changes in California Rules of Civil Liability

(*Continued from page 784*)

a furnished apartment house keeper or furnished bungalow court keeper one that was known to the common law.

Lateral and Subjacent Support

The common law rule that an owner of land is entitled to lateral and subjacent support which his land receives from adjoining land was incorporated in the Civil Code of California upon its adoption in 1872.[24] This rule applied only to the land in its natural state and there was no duty upon the adjoining owner to furnish support to buildings, although he was required to give reasonable notice to his neighbor of his intention to excavate.[25]

By the amendment of the Civil Code[26] certain qualifications of the common law rule were adopted. The requirement of "reasonable" notice was fixed at thirty days or more, under certain conditions. In addition, it was provided that if the excavation is to be twelve feet or deeper, and if the foundation or wall of the building of the coterminous owner is twelve feet or deeper, the excavator is liable for damages to the building caused by the excavation, provided he has been permitted to enter the land on which the building is erected in order to make provision for its protection. If, however, the foundation or wall of the building is less than twelve feet, the excavator has no duty other than to give thirty days' notice and permit the owner of the building to enter the land on which the excavation is to be made to protect his structure from damage.

Conclusion

The foregoing examples serve to illustrate some of the developments in the statute law by which changing economic and social conditions are reflected in legislation. The advent of the motor vehicle has resulted in liabilities not contemplated by the common law; the widespread distribution of corporate securities has resulted in a reversal of the California rule of stockholder's liability; and the development of the bungalow court has resulted in the application to it of the law relating to inns. The coming of the skyscraper has brought about a change in the old rule relating to adjacent and subjacent support of land, and the development of many delivery and inspection services has resulted in depriving the dog of his traditional first bite.

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24. Sec. 832 Civil Code.
25. *Aston* v. *Nolan*, 63 Cal. 269.
26. Stats. 1931, p. 1616, Sec. 832.

THE PUBLIC AND THE LAW—THE THREE MAJOR CRITICISMS OF THE LAW AND THEIR VALIDITY

Outstanding Criticisms Fall Under the Three General Headings of the Alleged Reign of Lawlessness, the Breakdown in the Administration of Civil Justice, and the Excessive Amount of Current Legislation—The Layman's Interest in the Problem—Grounds of the First Criticism Considered—Comparative Statements as to Amount of Crime, Yellow Journalism, the Real Function of Criminal Law, etc.*

By Herman Oliphant
Of the Institute of Law of Johns Hopkins University

PART I—INTRODUCTION

THE subjects usually chosen by men of law for lay audiences comprise a repertoire limited to about two basic themes. Ingenuity has, at times, produced numerous variations in treatment but such versatility of subject is more apparent than real. There seems to be some underlying necessity on such occasions either to defend the law against popular criticism or to indulge in hortatory eloquence on obedience to law and respect for legal institutions. No exemption from this necessity is here claimed, only an attempt to make the better of it. This discussion will deal with popular criticisms of the law because the apologetic character of that subject is less troublesome than the pontification implicit in the other one.

But more seriously, the choice of a subject for a discussion in the field of law, addressed to those whose major interests and concerns lie elsewhere, is not, at just this moment, difficult because critical popular interest is focused, with unusual sharpness, upon law and its administration. Numerous phases of law are now coming in for censure. Most of the criticisms, and the outstanding ones, fall under the three general headings: the alleged reign of lawlessness; the breakdown in the administration of civil justice; and the excessive amount of current legislation. To cover these subjects is to explore most of the field.

Some Grave Criticisms

Of these three, the first is receiving most attention. Newspapers have been filled with blazing headlines and not always temperate descriptions of miscarriages of criminal justice and of cases of seeming immunity of the criminal and the racketeer from the punitive processes of the law. Dishonesty in public office and scandal in high places have shared in this orgy of newspaper report and comment on disobedience to law. President Hoover, upon assuming office, said:

> "The most malign of all these designs (from which self goverment must be safeguarded) is disregard and disobedience of law." Inaugural Address, March 4, 1929.

The President and his advisors obviously deemed the matter of outstanding importance because it was made one of the principal items in the program of action of the new administration. On April 22, 1929, in what must have been a carefully considered statement, he again referred to the situation in the following startling, if not extreme, language:

> "What we are facing today is . . . the possibility that respect for law as law is fading from the sensibilities of our people." And again: "I am wondering whether the time has not come . . . to realize that we are confronted with a national necessity of the first degree, that we are not suffering from an ephemeral crime wave but from a subsidence of our foundations."

A situation of such apparent gravity easily wins first place among legal subjects competing for public interest.

The Layman's Interest in the Problem

While these three subjects lie in the technical field of law and government, there is nothing so abstruse about them as to prevent the layman from having an informed and well-founded opinion on the major questions they involve even though he may not express that opinion in the diction which it is the legal habit to use. The views of lawyers and other students of law, who spend all their time immersed in the details of their specialized fields, are likely to lack some of the detachment and perspective in which those somewhat removed from the field can view it. On many angles of numerous problems relating to the administration of justice and the enforcement of law, the judgment of laymen, who have taken pains to inform themselves, may very well be superior to that of specialists in the field.

The invitation to laymen to participate in a consideration of these problems of law and government can rest on yet broader grounds. The recent popularization of numerous fields of learning, initiated by H. G. Wells' "Outline of History," has produced books on all sorts of technical subjects for the lay reader. While many of them contain some workmanship of a grade calculated to grieve the experts in the fields involved, nevertheless, they are being distributed and read in fabulous quantities.

In retrospect, we may some day look upon such books as having initiated a new era in adult education. But whatever their effect upon the public, their effect upon the academic world is, in the main, wholesome. As time goes by, an increasing num-

*This is the first installment of Prof. Oliphant's article. The second and concluding installment will appear in the January issue of the Journal.

ber of elementary courses in our high schools, colleges and universities will have to be revamped by the addition of fresh material, large parts of their erstwhile esoteric content having become common property as a result of these numerous "Outlines" of literary and scientific subjects.

To a considerable extent, the public may be justified in its growing feeling that sizeable areas of learning which they have been taught to think could not be really understood except by members of the inner circle of the elect in these several fields of human knowledge are, in fact, not intricate nor difficult if stated simply and directly. Speaking for law, there occurs to me few problems of policy and public welfare in the legal field which cannot, if stated in unpretentious terms, be sufficiently understood by thoughtful laymen to enable them to grasp their import and to formulate a reasoned judgment upon their merits, and this in spite of the fact that law men write and talk to one another about these questions in a vocabulary much of which is unintelligible to the layman.

It is to such a consideration of the quality and degree of the three alleged major defects of law that this discussion invites its readers. As in the past, most major changes in our law will result from public demand. A wider and a fuller understanding of the issues involved in the changes demanded is needed.

PART II

THE ALLEGED CRIME WAVE AND BREAKDOWN OF LAW ENFORCEMENT

No dependable judgment of whether criminal law and its administration are breaking down, and of what the extent of such failure is, can be formed except by first trying to get some fair idea of what law at best may reasonably be expected to accomplish in our day and time. Lying at the very center of our thinking on the problem is this matter as to what, as a fundamental proposition, the effective uses of law in curbing lawlessness really are. But before considering that central theme, there are a number of preliminary matters to notice. A brief consideration of them will serve to simplify this focal problem.

What We Do Not Know

At the outset it is to be frankly admitted, and should become widely understood, that we have nothing like an adequate amount of reliable information as to the extent of current lawlessness. Anyone who may have occasion to look into the matter will probably be surprised at what a small amount of actual information, as opposed to vague impressions and general opinions, there is to be found anywhere, however diligent the search. True, scattered figures are to be found, and in some localities as to particular aspects of crime, there is full information for limited periods; but there are no statistics which, in point of the area, time and behavior covered, are adequate to give us a comprehensive and accurate view of the dimensions of the so-called crime wave.

We do know that in the past there have been crime waves in this country if, to prove they existed, we may rely upon the periodic exploitation of the matter by newspapers; but we know next to nothing of their extent, duration or seriousness or how they rank on these scores with conditions at the present time. Recently, a number of agencies have undertaken the task of formulating systems by which adequate statistics as to many aspects of crimes will, it is hoped, be made available; but these and similar measures are so recent or so limited in scope as to leave intact the statement that the available amount of specific and reliable information concerning the extent of lawlessness in this country is woefully insufficient as a basis for an informed judgment.

Comparative Statements on the Amount of Crime

One is warranted in mistrusting statements frequently seen in the press and elsewhere comparing the amount and kind of lawlessness in one community, state or nation with its amount and kind in others. A careful examination of such comparisons frequently reveals that they are not made from comparable data. For example, a little while ago, much publicity was given to a statement concerning the extent of a particular crime of violence in Illinois, the statement showing a sudden increase in the number of such crimes committed there as compared with the number elsewhere. The statement overlooked the fact that this increase in the crime in Illinois followed a change in the criminal statute involved, whereby the statutory definition of the crime had been enlarged to include many acts theretofore lawful.

Again, the crime situation in this country is frequently compared with that in England, greatly to our disadvantage. While I cannot qualify as an expert in the matter, I know of no figures so surely comparable and otherwise reliable as to warrant a comparison anything like as unfavorable to us as that commonly made. Speaking of England, one is reminded that the certainty and promptness with which the criminal is tried and punished there, as compared with the ordinary run of criminal justice in this country, have been the subject of much eloquent praise in newspapers and periodicals throughout the United States. Such vigor and promptness in the punishment of crimes are pointed to as the cause of the lesser amount of crime in England. But a number of eminently fair and sensible observers of the way in which the criminal courts in England actually operate have pointed out that we as a people would not tolerate their frequent peremptory and prejudicial treatment of persons accused of crime. Moreover there is reason to believe it wholly gratuitous to assume that crime is less abundant there solely or principally because punishment is more swift and certain. Not every accompanying circumstance is a cause. One acquainted with the stable and closely knit character of English life can find in it ample explanation of such lesser amount of crime as may be found there, when he contrasts the loosely knit and heterogeneous character of American urban communities.

Yellow Journalism and the Alleged Crime Wave

In addition to the fact that we have no reliable information enabling us to ascertain the extent of crime, there are in operation a number of factors calculated to mislead us when we attempt to judge its extent in the absence of adequate quantitative data. In recent years, a new class of newspapers has arisen. Their circle of readers and income from

advertisements expand and contract with the rise and subsidence of criminal acts which they are able to dramatize and exploit. So serious has this situation become that many more reputable newspapers, disinclined to cater to the public's morbid desire for the gruesome details of criminal behavior, have been compelled, as a matter of financial self protection, to print columns of material on murders and other crimes, to which they would otherwise devote little if any space. To this first type of yellow journalism, the tabloid type of newspaper has been yet more recently added. For many of these, murder cases along with divorce litigation and the doings of over-advertised racketeers are the principal stock in trade.

Such intense publicity given to the crimes that are committed cannot continue day after day and month after month without producing a cumulative effect, substantially modifying our general feeling as to the amount of crime there is abroad. Publicity is so subtle and all pervasive that it is difficult for us to factor out of our estimate of the extent of crime, the effects of the increased means of publicising crime whether newspapers, moving pictures or radio. There was a time when relatively few of the people in this country read any newspapers except a weekly paper, only the outside pages of which were printed in local county-seats. In those days, we heard nothing of the great mass of murders outside of our immediate communities or adjacent ones. There were than no giant newspapers with ravenous appetites for dramatic and startling acts of crime and with organizations combing the whole country for news of them. Naturally we tend today to think that crime has greatly increased.

So far as one can judge, the present tendency to over-exploit crime in the press is likely to be a growing one. Everywhere the search is on for "thrillers" whether in yellow journalism, popular music, moving pictures or radio programs. As the taste which these thrills feed becomes jaded, the things purveyed to the public must of necessity be made more and more thrilling. To a considerable extent it is true that there must be more and more lawlessness because only larger and larger doses of it will produce the emotional effect desired. Indeed, if there is not enough to supply the demand, a little can be fabricated. Does the sensational press ever understate the number and violence of crimes?

Overestimating the Spectacular

There is still another thing rendering difficult a balanced judgment as to the seriousness of the present crime wave so-called. The introduction of new mechanical devices has made a much more dramatic event of many forms of crime. A bank robbery with a thrilling escape by automobile, the robbers rushing across the country followed by cars in pursuit, is real drama. A murder committed with a blazing machine gun, fired from an automobile dashing past a crowded street corner in broad daylight, is something interesting to read and talk about. Trench warfare taught criminals to use bombs. They are another modern form of violence that is spectacular in the extreme. Importations of liquor effectuated by wide-spread organizations, correlated by radio, is a further illustration of how recent inventions have, by making some crimes more spectacular and dramatic, made the total of all crimes seem greater. The dashing figures of the stage coach and train robberies of the west supplied that era of crime with a glamor that magnified its seriousness.

Again, it should be pointed out that, in addition to the sensational press, there are numerous groups and whole classes interested and active in seeing to it that full publicity is given to certain types of violations of law. For example, there is a very large number of persons opposed to prohibition in its present form, who have not been engaged in any back-breaking effort to minimize the number and seriousness of the violations of the Volstead Act. There are probably races and groups who have some reason for thinking that an excess of space is given to crimes committed, or alleged to have been committed, by their members.

The Real Function of the Criminal Law

If proper allowance is made for all of these factors, each of which tends to distort our view of the extent of present lawlessness, a sizeable reduction is indicated but the residue disclosed is still disturbingly large. Before considering whether it is larger than we should reasonably expect it to be, there is another preliminary matter which needs to be borne in mind. It is completely to shut one's eyes to realities to assume that it is the function of our criminal laws to prevent crime. If that is their function, it is a most curious one because they have been in operation in our culture for some centuries and have never performed it.

Thus for those of us opposed to capital punishment to argue that it should be abandoned because it has been tried for hundreds of years and has not prevented murder is to miss the issue. If it is recognized that the function of criminal law is not to prevent all crimes but to reduce their number to a minimum, the issue is not whether capital punishment does or can prevent murders. Indeed, the issue is not whether it reduces their number but how it ranks in effectiveness on this score with other available preventive measures.

About that we know little. True there are figures on the yearly variations in the number of murders, during periods wherein capital punishment was introduced or abolished, but they are inconclusive. The opponents of capital punishment hail some of these figures because they detect in them a closer correlation between the yearly number of murders and other factors, such as industrial depression versus prosperity, than with the presence or absence of capital punishment. But not all murders have an economic motivation. To make a case against capital punishment, such figures would have to show that it does not reduce the non-economic residuum. Below the present range within which the yearly rising and falling line of murders now fluctuate, there is a range of unknown width whose bottom is the irreducible minimum of these crimes. The issue as to capital punishment is its relative effectiveness (among all appropriate measures) in making the murder curve approximate that base line.

But that line is not zero for murder or other crimes. There always has been, and probably always will be, a certain minimum of conduct which the social group will consider and treat as criminal.

It is an aid to clear thinking frankly to recognize that the purpose of criminal law is not to prevent all crime but merely to prevent an excess of crime. In an ideal world, such would not be the case, but in a world of realities, we have to reconcile ourselves as best we may to a certain minimum of crime which the processes of criminal justice are apparently powerless to reduce. When, therefore, we are weighing our dissatisfaction with the present amount and gravity of criminal conduct, it is only fair to our own thought processes to try and deduct from such dissatisfaction the considerable portion of it attributable to the distress occasioned us by the presence of any criminality at all.

It is thus seen that there is a considerable number of factors calculated to exaggerate the apparent amount of crime, and to make it difficult to form a measured judgment as to the height of the present crime wave if there be one. If due allowance is made for each of these factors, one who took the position that the present situation is not nearly so unusual and serious as it is commonly represented to be, could not be considered rash in his judgment.

A Slow Increase in Crime

That the amount of crime is greater than formerly is doubtless true. That it will gradually increase is most probable, particularly in the absence of novel measures to reduce it. Two slowly progressing factors causing an increase in crime are present, the increase in population and the growing complexity of social life.

Is it always recalled that the increase in population has been substantial since the time when most of us formed the notions with which we contrast present conditions?

As we from year to year shape and reshape our criminal laws to the pattern which life draws, we are being compelled to fit it to more and more intricate and numerous lines of human intercourse because social living is becoming more and more interdependent. This means a gradual increase in the number of acts which are prohibited, and to broaden the category of criminal acts is to increase the frequency of their occurrence.

The presence of such progressing factors may well mean that our real problems are not those of a crime wave but of a very slowly rising tide. Yet we have few reliable devices for measuring the rise if any. We are largely in the dark about it all. That, at least, is a situation which should not continue.

So much for the amount of crime. Whatever it is, it is large enough to call for thoughtful consideration of the reasons for its size and of possible measures to reduce it.

The Cause of Crime

Assuming a crime wave, what is its cause? To that question all sorts of answers have been returned. How numerous, diverse and confusing these answers are is indicated by a partial catalogue of them. Causes commonly assigned are: The breakdown of religion; the disintegration of the family; parents' neglect of their duty; moving pictures; sensational newspapers, magazines and books; the recent war; intoxicating liquors; prohibition; corruption in politics; the technicality of our courts; laxness of police administration. Each of these and many other factors are vigorously championed as the cause of crime.

In all this, there is nothing but bewilderment and confusion until one recalls that, for everything in which many different classes of people are interested, an equal plurality of causes is usually assigned and championed with equal vigor. Thus, if one asks what the cause of tuberculosis is, the answer is equally multiform. Dietitians will allege insufficient or improper nourishment. Those interested in improving dwellings will assert that it is improper housing. Others whose business or interest it is to emphasize the importance of fresh air will cite poor ventilation. Bacteriologists will assert that the cause is bacillus tuberculosis, and so on and on. About the only wisdom which can be distilled from such a confusion of conflicting opinion, whether it relates to the cause of lawlessness, tuberculosis, the present industrial depression or the sudden death of miniature golf, is that, for each one of us, that thing seems to be the cause with which he, for some reason or other, wants to tinker. Apart from any question as to the philosophical implications of the statement, it is helpful for present purposes to consider that, when we attempt to alter or maintain any situation, that thing is its cause which we want to manipulate for the end we have in view.

The Phases Here Stressed

Having said that, I hasten to disclose the particular prejudices with which I approach the matter so the reader may make due allowance for them. They are: first, that criminal justice is not sufficiently in touch with contemporary social reality, either in point of the acts it condemns and fails to condemn or in point of the organization of its administration; and second, that we are relying too much upon law to curb undesirable conduct and not enough upon other agencies of social control.

The following discussion will consider and be limited, in the main, to these two angles of approach, or causative factors. It should be borne in mind that they are but two of many possible and useful lines of attack, and such suggestions as may be ventured are not to be thought of as either solely sufficient cures or exclusive ones.

The Idealized Form of Criminal Law

It is submitted that a substantial part of the feeling that there is an excess of general lawlessness is due to the idealized form into which the whole body of our criminal law is cast. In all departments of life there is a very wide divergence between actual conduct and rule of supposed conduct. For example, if it ever occurs to some generation of students of ethics temporarily to forego the task of perfecting idealized codes of moral conduct and to undertake the more difficult but not less exciting task of accurately describing how the overwhelming mass of men actually behave, in the ordinary matters of daily life having ethical implications, and thus to give us a true picture of how men really conduct themselves, as opposed to how they ought to act, the realization of the extent of the divergence between actual conduct and supposed rule will come to many of us as a distinct shock.

What Law Cannot Do

This is not suggested as a project to be undertaken, much less as the be-all and end-all of ethics.

It is here referred to merely as an analogical point of departure in considering the problem of disobedience to law.

One of the particular prejudices or prepossessions with which this discussion approaches the problem, is that there is harmful self-deception and futility if we recognize that, through the years, the overwhelming mass of men behave in a certain way and, so far as we can see, will go on behaving in very much the same way, but, though recognizing this, largely leave it out of account in considering the problem of securing obedience to law. The statutory precept which only a hopeless minority observe and which the overwhelming mass of men ignore may be law for certain academic purposes, but it is not law in any realistic sense nor can it be usefully deemed such in the practical business of administering an effective system of social control in the world of realities about us. If in civil matters, for example, the great mass of people in a given locality, deem no contract enforceable unless there is some sort of writing evidencing it and uniformly act upon that assumption, then to ignore that fact and to insist that only some contracts need to be in writing is to court futility. If whole business communities uniformly treat a particular kind of document as a negotiable instrument, passing it from hand to hand day after day as such, then for student or court to say that it is not negotiable is to shout into the storm, even though in both cases the supposed rule is being enunciated.

The Basis of Law

Disturbing as the view may be, the effectiveness of law is quite limited. If we are to get anywhere in understanding the problem of lawlessness, we must face with open eyes and facts; (A) that the repeated, the persistent, the uniform and the overwhelming prevalent behavior of real people in actual life is the basis of all law, and (B) that the function of law is the limited one (a) of recognizing and embodying such uniformity of behavior and (b) of dealing with those relatively rare individuals whose conduct does not conform to the pattern of the behavior of the overwhelming mass of their kind. That has been the nature and function of all laws, both civil and criminal, which have been effective and which have endured. To use it in an attempt, by it alone, substantially to alter such general uniformity of conduct is to lessen its effectiveness to perform the functions it is able to perform.

Educational Uses of Legislation

This description of the appropriate use of the term law is not set out as a measure of the proper use of legislation or of other governmental measures. Statutes need not always follow the traditional and naïve form of commanding and forbidding. For example, it would be appropriate in many cases to use legislation as a hortatory or educational device. Thus it would be very interesting to see some legislature try the following. Suppose it wants to stop the killing of certain game at certain times. Let the legislature, instead of enacting a prohibition with penalties, simply recite the cogent and persuasive reasons why the game in question should not be killed and end with an appropriate exhortation so that the whole would appeal to the reason of thoughtful and fair-minded people. Such a measure, calculated to inform and crystallize group opinion, might be, in some carefully chosen situations, quite as effective as legislation of the present character which, uncritically following the most ancient models, is universally peremptory in form but not always so in effect. The stoutest opponent of sumptuary legislation, for example, cannot deny that, so far as it constitutes effective education and exhortation toward temperance, it is just as prudent and just as sound as any other measure.

Legislation has this and other appropriate functions, but, if it attempts by its prohibitions to do anything more than to reduce the frequency of acts not corresponding to those of the overwhelming mass of the group, it is doomed to failure. It should not be called law, or, if so, we should have some other term with which to designate rules that prohibit conduct not corresponding to how the great mass of men would act as a result of other forces of social control if there were no law on the subject in question.

Breaking Down Law by Overloading It

The point now being made is that, if we are to think of law as something both effective and enduring, it is necessary to limit it to confines which correspond to the behavior of the great mass of men and are transgressed by what is a relatively insignificant aberrant minority. To be effective, the law as to a particular act of an individual called into question must embody the behavior patterns, or voice the disapproval, of the great mass of men. The force of the social group must be behind it.

The more one has occasion to think about the effectiveness of laws, the more one realizes the relative impotence of the formal rule of legislature or court substantially to alter the conduct of any but that narrow fringe of people out of step with the group as a whole. This, it is believed, is half of the heart of the problem of law observance. If what we call law departs from law and attempts what law is powerless to accomplish, it is itself lawless and promotes lawlessness.

Law's Minor Role

Reflection shows that there is little either disturbing or surprising about the limited power of legal mandates and prohibitions. The social pressures which are most effective in shaping our conduct from day to day are not those which are voiced in rules of law and embodied in courts, sheriffs and policemen. They are such things as the need and habit of living life cautiously and our desire for the approval, and our fear of the disapproval, of that little series of social groups with which we are most intimately associated and which spread in widening circles from the family to the church, to our business community and other social aggregates within which most of our movements lie. The fact of capital importance is that a law's effectiveness varies directly with the extent to which it is integrated with such effective group pressures.

The alleged breakdown of laws, all will recognize as being, not wholly but more largely, a phenomenon of urban centers, and the reasons are not doubtful. Go back to medieval England with its more or less isolated and closely knit communities, each with its local court. When such a court

condemned, it voiced the disapproval of that community. That fact was its effectiveness. The social solidarity, of which the court was but the mouthpiece, was the all compelling force. For a long time in this country generally, and still in many areas, the lines of social solidarity were and are spatial or geographical. The boys of a farming community, for example, care most about the good or ill opinion of those nearest them. The boundaries of effective group control vary directly with the limits of habitual social intercourse.

It was during the period when the centers of social solidarity were thus distributed geographically that our courts were organized and distributed geographically; and so they still are, in the main, today. But, in urban communities, the proximity of two people in space has very little to do with the importance which one of them attaches to the good or ill opinion of the other. Thousands of families live in our cities, year after year, separated from one another only by single floors or partitions, without ever becoming acquainted, often never knowing one another's name.

The Effective Deterrents

This does not mean that there are no centers of social solidarity and of consequent social pressures in our cities. It means that their distribution is not geographical as is the administration of criminal law. This young man, not knowing any of the people who live in the same apartment building with him, will care little about what they think of his conduct, but, miles away on the other side of the city, there may be an athletic club of whose good opinion he is most jealous. His sister, coming and going without thought of her next door neighbors, will be most solicitous that the girls who work with her in the telephone exchange think well of her conduct.

Life in our cities, at least, has been moving out of the spatial grouping to which our agencies for administering criminal law were originally shaped and still largely correspond. It has been gathering into new grouping, forming new lines and centers of effective social pressure. A young man of the city, accused of crime, faces the judge, in what for many of us would be the impressive atmosphere of a court of justice, with an indifference that may, but should not, surprise us. He does not care a rap for what, as he would put it, that "high gink" up on the bench thinks of him. This is not because it is a judge that he is before. It is because that individual and all he represents is almost as completely foreign to his life as the inhabitant of another planet. If that judge voices the disapproval of a social group, it is of a social group as to whose good opinion the young man cares nothing because he is not a part of it in any vital sense.

But there are groups about whose opinion he very much cares and there are persons who embody and express such wholly effective group opinion. It is submitted that the other half of the heart of the problem of securing obedience to law is that of somehow finding what the boundaries of the various areas of effective group pressures have become and of somehow shaping our agencies for the enforcement of law within those boundaries and so shaping them that they will be geared into and thus utilize such effective group pressure. This counsel, while admittedly general and ambitious, does not have the perfection of complete abstractness. There are substantial reasons for believing that one of the brightest hopes of a partial solution lies in this general direction. Adequate exploration of this possibility must be left to experts in the field. I can do no more than give some samples of sporadic developments, pointing in this direction.

Examples of More Effective Control

There are, in a number of our large cities, organizations called by various names, the most common name being the Jewish Courts of Conciliation.[1] They represent a development of greatest value and significance. Frequently they are presided over by a rabbi and two or more laymen well known in the community. Many of them hear large numbers of disputes, most of which lie outside the realm of formal law. Examples of cases which these "courts" handle are: a child's failure to support his parents or to treat them with proper respect, disputes among tradesmen, questions involving matters of good faith between business partners, questions concerning matters in connection with the church. Young men facing these agencies of social control for reprimand, exhibit no indifference. Their orders and decrees are backed up by the force of no law in the ordinary sense, but all the evidence indicates that they are rarely disobeyed, for the reason that these informal agencies of social control embody and voice the opinion of a group which its members are quick to heed because their lives are interknit with it at many vital points.

In some of our cities, certain other peoples have similar informal agencies of arbitrament, which apparently are quite effective although neither law nor force is behind their decrees.

It is believed that a development of this same general sort, and of very great significance, is to be found in recent trends in the field of trade associations. To an increasing degree these new groupings of business men are undertaking to regulate the conduct of members whose behavior does not conform to that of the general run of the group. It is not that such associations are in position to apply economic pressure upon those who disobey the group judgment. Many of them are so organized that they have no such power. It is rather that we have here the segregation of individuals into groups whose favorable opinion is something which those individuals prize. For example, I am told that in some parts of the country an association of jewelers exercises a very effective supervision over its membership to prevent the sale of dishonest goods. Indeed in this case, the organization undertakes the prosecution of offenders outside its ranks, and this branch of criminal law is enforced, in some important centers at least, with unusual effectiveness.

Members of the New York Stock Exchange do not play fast and loose with the mandates of its Committee on Conduct, for example. The penalty is expulsion from the group, but so it is for misbehavior by a member of a religious body, and how effective as a sanction expulsion is depends upon

1. For an excellent description of the Jewish Conciliation Court in New York City and a vivid account of one of its sessions, see "A Reporter at Large" by Zelda F. Popkin, *The New Yorker*, Sept. 10, 1932, pp 36-43.

the community of social interest of the group in question.

Bail as a Case in Point

One of the serious problems of criminal procedure is that of bail. A man is arrested for some offense. He cannot be tried at once. His trial may show him innocent. If innocent men are not to suffer imprisonment for crimes they did not commit, there must be some way to free them pending trial but to make reasonably certain that they will be on hand for trial, and punishment if convicted.

At a time when the bulk of men had tangible property or had neighbors and friends who did, it was natural and feasible to require, as we still generally do, a bail bond secured by a pledge of property to be forfeited if the accused did not appear for trial. But today masses of our urban population have no substantial amount of property to pledge, or indeed to use as a means of flight. Their neighbors and friends being limited to their class are also propertyless. The result is that they are the easy victims of bail bond sharks who are intrenched in an antiquated system of bail bonds based dominantly on a property requirement applied to whole classes of people without property.

That such people are without property does not mean that it is impossible to get any hold on them, other than fear of loss of property. There are forces regularizing their movements. They are subject to pressures of social control. They are members of social groups. For example, there are leaders in these groups who could assure their presence for trial. Those leaders in turn may not have property to pledge in a bail bond, yet their simple written word that the accused would appear for trial would be wholly effective in the great mass of cases. To find such leaders, however, requires searching out the cluster points of the social life of the classes in question. They would be in some cases such personages as pastor, priest, rabbi, social worker, local political boss, and, before prohibition, the corner saloonkeeper.

An analogous consideration bearing on the problem of making the administration of criminal law again follow the lines of the effective forces of social control is suggested by the fact, often pointed out, that crime among the foreign element is dominantly a phenomenon of the second and later generations. The parents coming from foreign communities, and continuing in them here, are subject to effective forces of social control. The children break out of their compact foreign social groups into a social system which has little meaning tor them and hence exercises little control over them. So intricate and subtle are these forces of control that it is easy for there to be an excess of zeal and insufficient wisdom in ambitious programs of Americanization of aliens.

Other examples of the importance of extra-legal forces of social control to which present mechanisms for preventing crime need to be geared and thereby strengthened might be cited but sufficient have been given to indicate the general nature of what is believed to be one of the most hopeful directions of search for a part of the solution of the problem of better law observance and to suggest the ambitious projects of inquiry which such search requires.

Law in Books and Law in Life

For the public to aim its criticisms at the law for a crime wave of doubtful dimensions is to miss a vital spot, which is how little we know about the limits of effective control by criminal law and the ways to make more powerful social forces its ally.

Our knowledge as to the phases of human conduct amenable to law is slight and doubtful. Moreover, we know little about its actual effectiveness as to phases well within its proper sphere. For example, such have been the traditions of legal scholarship among which all students of law have grown up that, with enough time to review, almost any one of them could probably expound the technical legal definition of larceny and win for it general admiration of the symmetry and completeness of the logical development which legal scholarship has given it. But if he were asked to state something as to the limits of the criminal law's effective control of pawnbrokers as possible culpable receivers of stolen property, he might ransack law libraries but would have to stand mute. This is an isolated example, but it is not extreme.

Even more limited is our knowledge of the social forces into which the criminal law might be geared and of methods of so utilizing them. We know little about these two important matters because only recently has legal scholarship begun to turn from the fascinating task of weaving the law into self-consistent patterns of thought, largely detached from the brute realities of contemporary living, to the more troublesome business of interknitting it with the particulars of our time, place and circumstance.

(To be concluded in next issue.)

Defamation by Radio

(Lawrence Vold in Oct. Journal of Radio Law)

The broadcasting station actively participates with the speaker at the microphone in carrying out the processes of publication by radio. It is therefore a joint publisher of the utterances broadcast. It is not in the position of merely having furnished the mechanical facilities to the speaker by means of which he alone did the publishing.

It follows that the broadcasting station in the absence of applicable privilege is subject to liability as publisher where it has published defamatory utterances. Publishers of defamatory utterances act at their own peril. They are not permitted to reap the profits of publication while throwing its burdens upon others. Even though a publisher may have used due care in making publication, that is not a defense if the published utterance was defamatory. In this respect radio broadcasting publishers are not entitled to greater favors at the expense of their passive helpless victims than are other publishers.

Publication by means of radio broadcasting, because of the deliberation, diffusion and damage involved, must be governed by the rules applicable to libel rather than slander.

Whether any privilege can properly be claimed for the radio broadcasting station in connection with political speeches by virtue of the Federal Radio Act is at best very doubtful.

A VISIT TO THE SHRINE OF ST. IVES, PATRON OF OUR PROFESSION

By John H. Wigmore

On a pleasant afternoon of August last, the fine old cathedral of Tréguier (a town on the north coast of Brittany) witnessed a simple but impressive ceremony, and the brief story of it will be of interest to all members of the American Bar Association.

Tréguier was the home, six hundred years ago, of Ivo Heloury of Kermartin, lawyer and later judge of the Church court, who for his life of unselfish devotion to justice for the poor and helpless was later canonized as Saint Ives. He has long been accepted in every country as the patron saint of the legal profession. (Some account of his deeds and his merits was printed in the March number of this Journal, vol. XVIII, p. 157.) In the Cathedral at Tréguier is his superb marble tomb.

So, in connection with the International Congress of Comparative Law, held August 2 to 6 at the Hague, and attended by some 70 delegates from the United States, a plan was formed to visit Tréguier after the Congress, and there to pay homage to our patron saint, by presenting to the Cathedral a brass tablet inscribed in memory of the visit.

The mayor of Tréguier, M. Gustave de Kerguézec (also a senator of the Republic), cordially acquiesced, in correspondence. A Paris house prepared a handsome tablet, bearing the arms of the family of St. Ives, with the following inscription:

HOMMAGE
DES AVOCATS DES ETATS UNIS
D'AMERIQUE
AU PATRON DE LEUR PROFESSION
SAINT YVES
EN SOUVENIR DE LEUR VISITE
21 AOUT 1932

After the Congress at the Hague, the Committee charged with the presentation of the tablet reduced itself to the undersigned alone; for the pressure of home affairs and the diverse plans of touring parties obliged the other members to depart elsewhere.

Accordingly, after a few days in Paris, I went to Tréguier by motor car, with a small party of personal friends. Calling first at the City Hall, we were received by M. Yves Correr, deputy-mayor (the mayor himself being absent from the city) and then proceeded to the Cathedral nearby, where the tablet was affixed to a pillar, close to the marble tomb of the Saint. Here we were cordially welcomed by the honorary canon of the Cathedral, M. Louis Lainé, curé and chief priest of Tréguier—a personage of noble mien and magnetic charm. Garbed in full canonical dress, he took his stand, with the deputy-mayor and the American delegate, in front of the marble tomb; grouped near at hand were the American party and a throng of Tréguier citizens.

Tablet in Honor of St. Ives Presented by American Lawyers.

The American delegate then presented the plaque in the following terms (translated from the French). "M. le Curé-Archipretre, and M. l'Adjoint: I come here, with my friends, as delegate from the Bar Association of the United States of America (now numbering more than 30,000 members), to pay respect to St. Ives, patron of the lawyers, not only of France and of the United States, but of all countries of the world. 'Sanctus Ivo erat Brito, Advocatus sed non latro, res miranda populo.' A man of great learning, austere habits, kind heart, and unselfish Christian devotion, he spent his whole life, both as lawyer and as judge, in rendering justice without recompense, to the poor, the widows, the orphans—in short, to all who had need of justice. May we too, with Divine aid, imitate his example, so far as is possible for our frail humanity, in discharging the noble task of our profes-

sion. And so, sir, I ask your permission to affix here this tablet of brass, as a permanent memorial of this occasion and an expression of the homage of my fellow members of the Bar of the United States to the patron saint of their profession."

The Curé then responded as follows: "Mr. Delegates of the Bar of the United States: I am deeply touched by your words and by this noble gesture on the part of your fellow-members. And it gives me also great happiness. All through this country, and especially at Tréguier, we are so devoted to St. Ives that it cannot be indifferent to us to find that he is taken as an example by other peoples, and especially by a great people like your own. I only wish that all my parishioners could have been here on this occasion to witness the handsome gift that you have brought, which will testify perpetually to your respect for St. Ives, patron of your profession. And next Sunday, from the pulpit, I shall tell my congregation of your visit, and shall point out to them this valued souvenir.

Ceremony of Presenting the Tablet from the American Bar to Honor St. Ives at Tréguier August 21, 1932. Left to right: M. Ives Correr, Deputy Mayor, Louis Lainé, Curé and Honorary Canon, and John H. Wigmore.

"It so happens, sir, that the curé who now speaks to you was during the Great War attached as interpreter to the Seventh Regiment of American Infantry in France, and that he was wounded, on Oct. 5, 1918, at Cierges, in the terrific combat around the fortress of Montfaucon, while with your doughboys,—those boys who freed the soil of France. I am therefore one who is least likely to forget what the United States did on our behalf; for it was their entry on the scene, with all their great strength, that brought victory.

"But may I venture to express the hope that this gift is but a welcome presage of a greater blessing to us? For it has long been my cherished dream to restore, in this superb cathedral, the stained-glass windows which were destroyed by the mob at the time of the French Revolution. You have mentioned that your bar association has some 30,000 members. Would it not, sir, be easily possible, and well worthy of the dignity of your Association, to place here, in this chapel, a window depicting St. Ives rendering justice to the distressed? In the lower part of the window could be shown the beautiful colors of the Stars and Stripes, with this legend: 'The gift of the Bar Association of the United States of America to Saint Ives, patron of their profession'; followed perhaps by the ancient Latin saying which you quoted in your speech.

"I must confess, indeed, to some chagrin when I reflect that you Americans would be the first to do this; for our lawyers of France have not yet undertaken the like tribute to our saint. But I am persuaded that they too would be spurred by your example and would soon do likewise.

(*Continued on page* 829)

AMERICAN BAR ASSOCIATION JOVRNAL

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JOSEPH R. TAYLOR,
MANAGING EDITOR
Journal Office: 1140 N. Dearborn Street
Chicago, Illinois

THE RESTATEMENT OF CONTRACTS

Publication of the American Law Institute's Restatement of the Law of Contracts is, as Chief Justice Hughes justly declares, an event of the first importance. It is the first completed product of the labors of over nine years, during which the Institute's special method of bringing together the most competent members of Bench and Bar and School to work on the clarification of the principles of the Common Law has had full play.

What are the leading ideas which distinguish that plan as applied to the Restatement of Contracts, now completed, and other subjects on which the work is now rapidly approaching completion?

The main idea is that the restatement is to be a formulation of the Common Law as it is, without any attempt to reformulate it as it ought to be. It is in aid of the Common Law and its familiar method of developing principles by judicial decision and not by legislative fiat. Though the Restatements appear in form, ex cathedra, they are free from the vice of legislative rigidity. They make for uniformity of decision by the persuasive force of a competent body of legal opinion, and they contemplate no other compulsion.

Another outstanding idea is that the clarification and simplification of what has been called "the enormous legend of the law" can best be accomplished by a process of study, discussion and debate participated in by scholars, judges and practitioners. This is what Chief Justice Hughes means when he speaks, in another part of this issue, of the Institute's "distinctive method of cooperation in the development of the law." This idea of debate is of the essence of the plan, and those who have participated in the work of restating the Law of Contracts and other subjects know that it has been sincerely followed. The Reporter and his Advisers have devoted long sessions to the discussion and resolution of conflicting views. Often the conflicts there settled have been revived in the Council, and in that body new differences have arisen which called for full discussion. The Regional Conferences and the Annual Meetings have also offered further opportunity for debate. It is well to emphasize the fact that the Restatement is the final result of the careful scrutiny of the three major branches of the profession.

A controlling idea behind the whole great enterprise is to make the Restatements authoritative with both Bench and Bar—second only to the authority of the several State Supreme Court decisions. Even there it is expected that the Restatements will be highly persuasive except where a settled rule has been too firmly established to be lightly abandoned. Only by being so authoritative can the Restatements accomplish their main purpose, which is to solve the problem created by the constantly increasing volume of decisions which must before many years be beyond human capacity to handle, even with the aid of digests and treatises. Such authority, although without other compulsion than the excellence of the work, is the natural and logical consequence of the prestige which comes from the genuine, long and critical collaboration of a body of men recognized by the profession as eminently qualified to do the work.

Another ever-present idea is that the Restatements are to be practical tools for the working lawyer and judge. In fact, the practical aspect of the problem created by the confused and voluminous mass of decisions, was what inspired the whole enterprise. It was to procure a practical solution of the problem that the Institute was organized and has been functioning for over nine years. The Restatements are intended to be, as the late James C. Carter put it in outlining a somewhat similar plan, "the indispensable tool of his profession" to each member of the Bench and Bar.

It was this idea that the Restatements

are to be working tools for the busy lawyer and judge—and not merely products of a refined and meticulous scholarship, to be admired and not used—that led to the adoption of the plan for State Annotations. With the restatement of a particular subject and the State Annotations, the busy practitioner and judge will have a fair working library on that subject. They will no doubt be surprised to learn what an astonishing conformity there is between the Restatements and their State decisions. Some variations will occur from time to time. But in an overwhelming majority of cases, even the present limited experience shows, they will find the law of the Restatement to be the law of their own States.

Such are the main ideas of the plan, and they have been vindicated to a remarkable extent by the use which the Bench and Bar have already made of the authorized and even the tentative drafts of various subjects. The authority of the Institute—which means of course the confidence of the profession in its method of work and the men it has enlisted to carry it out—has been recognized time and again by Appellate Courts in their decisions. In brief, the Restatements have made their way, as Blackstone's Commentaries and earlier Institutes made theirs, strictly on their own merits. When published in a final and definitive shape—as is now the case with the Restatement of Contracts—they cannot fail to inspire an even greater degree of confidence. As Prof. Williston himself suggests, when one observes "how even questionable statements in legal encyclopedias or text books are often copied by the courts of one jurisdiction after another, it seems plain that the rules of the Institute's Restatement, which have been drawn with a degree of care and cooperation of learned persons, impossible in the production of encyclopedias and treatises, should have even greater currency."

Coming to the Restatement of Contracts, we believe the profession will welcome it as a monumental achievement of legal scholarship of which all lawyers may well be proud, and as a practical tool which no lawyer can afford to be without. The Restatement and the Annotations of the lawyer's own State will give the young practitioner a working mastery of a vast field previously open only to the experienced lawyer with all the resources of an army of digest-makers, treatise-writers and office assistants at his command. He will have to have it to keep up to date, and the older lawyer will have to have it to keep up with the younger generation, fast pressing on his heels.

It is hardly necessary to say that in the selection of Samuel Williston as Reporter, the Institute chose the foremost legal expert on the subject, and that his associates in the writing of special chapters, and his advisers, were all fully equal to their task. To the authority of these men, as Director William Draper Lewis points out in his address printed in the November issue of the Journal, has been added the whole machinery of the Institute for successive discussion and revision by the Council, the Conference of Cooperating Committees of State Bar Associations, and by the Institute itself.

The Restatement of Contracts is now presented to the Profession. It may be taken as the well-considered opinion of Bench and Bar and School as to what the Common Law is on the subject. But it is more than that. It is tangible evidence that the difficulties inherent in the Common Law system with its increasing mass of decisions—difficulties which might eventually overwhelm the system itself with an impossible task—can be met by the united efforts of the profession. It promises the complete rescue of "Our Lady of the Common Law."

M. Paul Reynaud Thanks Association

President Martin has received the following letter of thanks from M. Paul Reynaud, the representative of the Paris Bar at the recent Annual Meeting and one of the prominent figures on the program:

Ritz-Carlton Hotel, New York, Oct. 24th, 1932.

Dear Mr. Martin:

I wish to express to you my hearty thanks for the hospitality and for the kindness the American Bar Association and its members have displayed toward the representative of the Paris Bar.

I hope that we shall see you some day in Paris.

Believe me, dear Mr. Martin,

Very sincerely yours,

PAUL W. REYNAUD

Correction

In its report of the Proceedings of the Fifty-Fifth Annual Meeting the Journal referred to one of the members on the floor as "John James Baicher." The name should have been John Joseph Baecher. Mr. Baecher is a member of the Norfolk, Va., Bar.

REVIEW OF RECENT SUPREME COURT DECISIONS

Conviction Under Tariff Act for Importation of Intoxicating Liquors in Violation of Prohibition Act Upheld—Webb-Kenyon Act and State Prohibition Laws not in Conflict with Eighteenth Amendment Have not Been Repealed or Superseded by Amendment or National Prohibition Act—Forfeiture Provisions of National Act not Exclusive of Other Forfeiture Provisions Contained in Customs Laws, Navigation Laws and Other Cognate Statutes—Provisions of Oklahoma Oil Conservation Act Forbidding Wasteful Production of Crude Petroleum Upheld, But Penal Provisions Declared Invalid—Other Cases

By Edgar Bronson Tolman*

Intoxicating Liquors—Importation in Violation of the Tariff Act

The importation of intoxicating liquors in violation of the Prohibition Act constitutes an offense under the Tariff Act which makes it a criminal offense to import "any merchandise contrary to law," and supersedes the general provisions of the Prohibition Act by prescribing a specific penalty for such importation.

Callahan v. United States, Adv. Op. 545; Sup. Ct. Rep., Vol. 52, p. 454.

The petitioner in this case was convicted under §593 (b) of the Tariff Act of 1922 for aiding and abetting the importation of intoxicating liquors contrary to law, specifically in violation of Title II, §3, of the National Prohibition Act. He urged that the indictment charged an offense under the prohibition act but not one under the tariff act, and was duplicitous as including offenses under both.

On certiorari the conviction was affirmed by the Supreme Court in an opinion by Mr. Justice Roberts. The ground in support of this ruling was stated as follows:

> We are asked to hold that one who violates the prohibition act by importing liquor, may not be indicted, tried and sentenced under the tariff act, which makes the importation of "any merchandise contrary to law" a criminal offense. The phrase "contrary to law" as used in the later act is unqualified and taken in its natural meaning signifies "contrary to any law," and hence contrary to the earlier prohibition act, so that a violation of that act would be an offense within the other.
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> The petitioner urges that the National Prohibition Act deals specifically with intoxicating liquor, prohibits its importation and provides a penalty therefor; whereas the tariff act is concerned with a wholly separate subject and the penal section 593 (b) aimed at unlawful importation should not be construed as repealing the earlier special statute. . . This argument overlooks the fact that the National Prohibition Act prescribes no special penalty for importation in violation of its provisions. Section 29 of Title II, an omnibus section fixing penalties for violations for which no special penalty is prescribed, is the only one under which punishment could be imposed for illegal importation. The language used is sufficiently broad to include specific penalties fixed in other sections of the statute and also such as might be imposed by separate legislation. The tariff act, a later statute, fixes a definite penalty for one of the violations grouped in the penal section of the earlier act. In this respect it superseded the general provisions of the prior statute embracing the same subject. . . . The indictment charged an offense under the Tariff Act and the judgment must be affirmed.

The case was argued by Mr. Louis Halle for the petitioner, and by Mr. Assistant Attorney General Youngquist for the Government.

Intoxicating Liquors—State Prohibition and License Laws — Effect of Eighteenth Amendment on Webb-Kenyon Act and State Laws

The Webb-Kenyon Act and state prohibition laws which do not permit what the Eighteenth Amendment forbids have not been repealed or superseded by the Amendment or by the National Prohibition Act. A state law requiring all persons to obtain state licenses before shipping intoxicating liquors into the state is valid, where the statutory definition of "intoxicating liquors" is not arbitrary, even though the persons shipping the products act under a permit from the federal authorities, in compliance with the National Prohibition Act, since, under the Webb-Kenyon Act, the state may impose different and higher regulations and penalties, supplemental to the National Prohibition Act.

McCormick & Co., Inc., et al. v. Brown, et al., Adv. Op. 771; Sup. Ct. Rep., Vol. 52, p. 522.

This opinion, by Mr. Chief Justice Hughes, dealt with the effect of the Eighteenth Amendment and the National Prohibition Act on state prohibition and liquor licensing laws, and on the Webb-Kenyon Act. The appellants, non-resident manufacturers and wholesale dealers, sued to restrain state officers of West Virginia from requiring them to obtain a permit from the State Commissioner of Prohibition and to pay an annual license fee before shipping certain products into the State to purchasers for resale there.

The appellants alleged that, although the products contained ethyl alcohol, they were used and usable solely for medicinal, mechanical, toilet and culinary purposes, and were not intoxicating liquors or fit for beverage purposes under the federal laws; that they were covered by permits issued under the National Prohibition Act; and that the shipments were to dealers holding State permits. The officers denied that the products were used or usable solely for the purposes alleged and that none were intoxicating; and while admitting that the complainants held permits under the National Prohibition Act, the defendants

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asserted the validity of the State laws or regulations requiring permits and payment of license fees.

The District Court, specially constituted, denied the injunction, after hearing on pleadings and affidavits. On appeal the decree was affirmed by the Supreme Court.

The State Constitution prohibits the manufacture, sale and keeping for sale of spirituous liquors or any intoxicating drink, except for certain specified purposes. A statute of West Virginia, penalizing the sale of liquor, defines "liquors" as embracing "all liquids, mixtures or preparations, whether patented or not, which will produce intoxication." It provides that in case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier the sale is deemed to be made in the county of delivery. Exceptions from the prohibition include sales of wine for sacramental purposes and preparations made in conformity with the state pharmacy law and the national pure food law. No one may sell, keep for sale, purchase or transport any liquors without procuring a permit from the commissioner to do so. Permits are issued for one year upon payment of specified fees.

The statute also forbids common carriers from carrying intoxicating liquors into or within the State, except as allowed by the specifications as to sacramental wine and preparations made under the pharmacy and pure food laws. It is made unlawful for non-resident dealers to sell any of the proscribed articles to be sold or used, in the original package or otherwise, in violation of the state prohibition laws.

Regulations of the commissioner, made pursuant to the statute, classify non-resident manufacturers as "wholesale dealers" and permit them to deal in the products upon obtaining a permit, and to sell at wholesale to others also holding permits, for the legitimate purposes specified.

The complainants' products fall within the regulations, and were found by the District Court to be "liquors" within the meaning of the statute. The defendants presented affidavits that their products were unfit for beverage purposes, but the Court, finding it unnecessary to determine this question specifically, passed at once to the question as to the State's power, in view of the interstate character of the business and federal legislation. Describing the purpose of the Webb-Kenyon Act, and declaring that it has not been repealed either by the Amendment or the National Prohibition Act, MR. CHIEF JUSTICE HUGHES said:

> Prior to the adoption of the Eighteenth Amendment, the Congress, exerting its constitutional power of regulation, had prohibited the movement in interestate commerce into any State of intoxicating liquors for purposes prohibited by the state law. (The Webb-Kenyon Act. . .) With direct application to the prohibition law of West Virginia (the predecessor of the present statute and having a similar definition of "liquors," West Virginia Laws, 1913, chap. 13), this Court held that the purpose of the Webb-Kenyon Act "was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught." The Act was said to operate "so as to cause the prohibitions of the West Virginia law against shipment, receipt and possession to be applicable and controlling." . . The appellants do not urge, and there would be no ground for such a contention, that either the Eighteenth Amendment or the National Prohibition Act had the effect of repealing the Webb-Kenyon Act. The Congress has not expressly repealed that Act, and there is no basis for an implication of repeal. The Eighteenth Amendment and the National Prohibition Act have not superseded state prohibitory laws which do not authorize or sanction what the constitutional amendment prohibits. . . Such laws derive their force not from that amendment but from power originally belonging to the States and preserved to them by the Tenth Amendment. . . As the prohibitory legislation of the States may thus continue to have effective operation, there is no reason for denying to the Webb-Kenyon Act its intended application to prevent the immunity of transactions in interstate commerce from being used to impede the enforcement of the States' valid prohibitions.

The contention of the appellants, that their products are not "intoxicating liquors" within the meaning of the Webb-Kenyon Act, was then considered. In this regard the argument advanced was that the terms must be defined in the light of the National Prohibition Act, which exempts certain products containing alcohol, and permits their manufacture and sale under certain conditions. Rejecting this contention, the Court said:

> When the definition of intoxicating liquors, as set forth in state legislation and as applied to such preparations, is not an arbitrary one—and it cannot be regarded as arbitrary in the instant case—the Webb-Kenyon Act must be taken as referring to the liquors which the state legislation describes, or the plain purpose of the Act would be frustrated. The same reasons which lead to the conclusion that the Webb-Kenyon Act was not repealed by the National Prohibition Act, compel the view that the scope of the application of the former was in no way limited by the latter.

In conclusion, the operation of State and Federal prohibition laws was discussed.

> In determining the ultimate question of the validity, not simply of the State's prohibitory legislation in its general features, but, in particular, of its requirement of permits as to products for which Federal permits have been issued, we need only refer to the criterion established by the decisions of this Court. While state legislation cannot give validity to acts prohibited by the Eighteenth Amendment, that legislation may provide additional instruments to make prohibition effective. That the State may adopt appropriate means to that end was expressly provided in section two of the Amendment in declaring that "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." . . The mere fact that a state statute has broader scope than a provision of the National Prohibition Act upon the same subject does not affect its validity. . . Different and higher penalties may be provided by the state law. . . State legislation imposing punishment for the sale of liquor without a state license may be enforced. . . In *Moore v. Idaho*, 36 Idaho 565, affirmed 264 U. S. 569, Moore was convicted of having intoxicating liquor in his private dwelling in violation of the state law, notwithstanding the stipulation that his possession was "permitted by and lawful under the provisions of section 33 of the National Prohibition Act." . .
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> Applying the principle thus repeatedly declared, we are of the opinion that the provisions of the National Prohibition Act relating to the issue of permits did not supersede the authority of West Virginia to require state permits, as in the instant case, in the appropriate enforcement of its valid legislation.

The case was argued by Mr. Philip C. Friese and Mr. H. D. Rummel for the appellants, and by Mr. W. G. Brown and Mr. R. Dennis Steed for the appellees.

Intoxicating Liquors—Forfeiture of Vehicles—Remedy Provided by Prohibition Act Not Exclusive

Vehicles employed in importation of intoxicating liquor in violation of the Tariff Act are subject to forfeiture under appropriate provisions of the Customs Laws, and the forfeiture provisions of Section 26, Title II, of the Na-

tional Prohibition Act are not exclusive of other forfeiture provisions.

Vessels employed in importation of such liquors in violation of the navigation laws and other cognate statutes are likewise subject to forfeiture under the applicable provision thereof.

General Motors Acceptance Corporation v. United States, Adv. Op. 619; Sup. Ct. Rep., Vol. 52, p. 468.

This opinion, by MR. JUSTICE CARDOZO, disposed of four automobile forfeiture cases involving the same legal questions, which were presented to the Court on a certificate from the Ninth Circuit. Of the four questions certified, the first only was answered, since two of the others were disposed of by the answer to the first, and the fourth was not so presented as to permit or require satisfactory answer. The first question was stated in the following terms:

> "Does Section 26 of Title II of the National Prohibition Act repeal by implication and render inoperative in liquor importation and transportation cases the forfeiture provisions of the Customs Laws, in so far as offending vehicles are concerned?"

It appeared in the record that four automobiles were seized by government officers at ports of entry near the Mexican border, and each vehicle was found to have liquor concealed in it. Each had traveled some distance in the United States before seizure at the Customs stopping places. The drivers were arrested and were indicted for and convicted of unlawfully importing liquor into the United States, they having pleaded guilty to the charge.

A libel was then filed by the Government against each vehicle, claiming forfeiture under Section 3061 and 3062 of the Revised Statutes. The appellants intervened as owners, setting up that they were innocent of any illegal acts in which the cars were involved, and prayed that the libels be dismissed, contending that the Government's sole remedy was under Section 26, Title II, of the National Prohibition Act. The District Court decreed forfeiture in all four cases, finding that each automobile was engaged in smuggling dutiable merchandise into the United States in violation of the Customs laws.

In answering the certified question in the negative, MR. JUSTICE CARDOZO first pointed out that the importation of liquor is a criminal offense under the Tariff Act, as held in *Callahan v. United States* (also reviewed herewith). In the light of this and of the fact that vehicles used in smuggling goods other than liquor may be forfeited, no basis was found for the contention that forfeiture could not be based on a prosecution for unlawfully importing liquor.

> The importation of intoxicating liquors without permit and without payment of customs duties is a violation of the tariff act and a criminal offense thereunder. This was the law under the tariff act of 1922, enacted after the adoption of the Eighteenth Amendment. Tariff Act of 1922, c. 356, sec. 593 b; 42 Stat. 982; U. S. C., Title 19, sec. 497. It is still the law under the present tariff act of 1930; U. S. C., Title 19, sec. 1593. True, the drivers of the cars who brought these liquors from Mexico into California were subject to prosecution under the National Prohibition Act, 27 U. S. Code, sec. 46. They were subject to prosecution under the tariff act also (*Callahan v. United States,* — U. S. —, April 11, 1932), and under that act they were indicted and convicted.
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> The appellants would have us hold that prosecution of the offender may be based at the election of the Government either on the one act or on the other, but that forfeiture of the implements used in his offending may be based on only one of them. The consequence of such a holding would be to withdraw from the tariff acts remedies and sanctions existing for the better part of a century. Forfeiture of vehicles bearing smuggled goods is one of the time-honored methods adopted by the Government for the repression of the crime of smuggling. . . Certain it is therefore that vehicles carrying smuggled merchandise other than intoxicating liquors may still be seized and forfeited under the provisions of the tariff acts and those of the Revised Statutes ancillary thereto. The forfeiture may be enforced even against innocent owners, though the Secretary of the Treasury may remit it, upon such terms as he deems reasonable, if satisfied that there was neither wilful negligence nor intent to violate the law. R. S. sec. 378; Tariff Acts of 1922 and 1930, sections 613, 618. The penalty is at times a hard one, but it is imposed by the statute in terms too clear to be misread. Beyond all room for question, the owner of a vehicle bearing smuggled merchandise runs the risk of forfeiture, subject to remission by the grace of an administrative officer, where the merchandise is medicine or wheat or drygoods or machinery, subjects of legitimate trade upon payment of the lawful duties. The argument for the interveners is that the intention of Congress was to make the risk a lighter one where the trade is wholly illegitimate, i.e., where the merchandise smuggled consists of intoxicating liquors. They tell us that perhaps a forfeiture under the tariff acts will be permitted when what is laden in the vehicle is partly intoxicating liquor and partly something else. . . They insist, however, that the remedy under those acts must be held to be excluded when liquor and liquor only is the subject matter of the carriage.
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> Section 26 of the National Prohibition Act (41 Stat. 305, 315; U. S. C., Title 27, sec. 40), which is quoted in the margin, is said to lead to that bizarre result. We think its purpose is misread when such a meaning is ascribed to it. Section 26 of the National Prohibition Act is not directed against smuggling, though the conduct that it does cover may be an incident of smuggling. The Eighteenth Amendment distinguishes the importation of intoxicating liquors into the United States from their transportation within, or their exportation from, the United States, just as it distinguishes each of these activities from manufacture and from sale.

The appellants contended that to permit forfeiture here, under the Tariff Act, would be inconsistent with *Richbourg Motor Co. v. United States,* 281 U. S. 528. But vital distinctions were noted between that case and the cases at bar. There the forfeiture was attempted under provisions of the revenue law enacted when the liquor business was lawful, so that the inference was that the provisions relating to transportation with intent to defraud the United States of taxes had been superseded by forfeiture provisions of Section 26 of the Prohibition Act. The first distinction stated was that the driver there was arrested at the time of the seizure and charged with illegal transportation, so there had been an election to proceed under the Prohibition Act. The second distinction emphasized was that removal from one place to another, within the United States, is more intimately related to the prohibition law than is wrongful importation in evasion of the customs.

The difficulties involved in ignoring these distinctions was emphasized.

> To refuse to give heed to these distinctions will lead us into a morass of practical difficulties as well as doctrinal refinements. If forfeiture of a vehicle seized in the course of importation must always be under section 26, and not under other statutes, then the smuggler arrested at the same time must always be prosecuted under the prohibition act, and never for the smuggling, since seizure under section 26 must be followed, as we have seen, by prosecution of the arrested person under that title and no other. We cannot bring ourselves to believe that Congress had in view the creation of so great a breach in historic remedies and sanctions. . . Derangement of a system thus rooted in tradition is not to be inferred from a section aimed upon its face at transportation within the United States and not at importation from without. . . Repeals by implication are not favored . . . and least of all where inveterate usage forbids the implication. Indeed, the breach, if we once allow it, will hardly be confined within the ramparts of the acts that regulate the duties upon imports. If

> a forfeiture under the customs laws is forbidden where there has been an unlawful importation of intoxicating liquors, we shall have difficulty in upholding a forfeiture where there has been a violation of the navigation laws or other cognate statutes. Already the net of these complexities has entangled the decisions. . . Courts accepting the conclusion that the customs forfeitures are ended in respect of intoxicating liquors have been unable to extricate themselves from the conclusion that forfeitures under the navigation acts have fallen at the same time. A halt must be called before the tangle is so intricate that it can no longer be unraveled.

In conclusion, the diversity of opinion respecting the implied repeal of the forfeiture provisions and the effect of the Willis-Campbell Act was noted. That Act continues in force all liquor laws in effect when the Prohibition Act was adopted, except such provisions as are "directly in conflict with the provisions" of the latter.

> The advocates of an implied repeal insist that there is a direct conflict between a statute whereby immunity for innocent lienors or owners is given as of right and a statute whereby immunity is on the footing of an act of grace. To this the retort is made by the opponents of repeal that the spheres of the two immunities are diverse and that the apparent conflict is unreal. Transportation within the United States is the sphere of the one, and importation from without the sphere of the other.

MR. JUSTICE CARDOZO also delivered the opinion in *United States v. Schooner "Ruth Mildred," General Import and Export Co. v. United States,* and *United States v. Commercial Credit Co.,* involving cognate questions.

The first of these related to forfeiture of a vessel licensed to engage in the cod and mackerel fisheries. She was found to contain a cargo of liquors and was libeled for carrying on a business not permitted by the license. The District Court sustained a defense pleaded by the master of the vessel that the remedy under Section 26 of the Prohibition Act was exclusive, and dismissed the libel. The Circuit Court of Appeals affirmed the decree. In an opinion reversing this, MR. JUSTICE CARDOZO said:

> Our decision in No. 574, General Motors Acceptance Corporation and others against the United States of America, would require a reversal of this judgment if the vessel had been seized for unlawful importation in violation of the tariff act. Even more plainly that result must follow where the basis of the seizure is a breach of the navigation acts growing out of a departure by the vessel from the conditions of her license. . . By section 4377 of the Revised Statutes (U. S. Code, Title 46, sec. 325): "Whenever any licensed vessel . . . is employed in any other trade than that for which she is licensed, . . such vessel with her tackle, apparel, and furniture, and the cargo found on board her, shall be forfeited." The "Ruth Mildred" was licensed for the fishing trade and not for any other. She would have been subject to forfeiture if her cargo had been wheat or silk or sugar. In a suit under this statute, her guilt was not affected, was neither enlarged nor diminished, by the fact that the cargo happened to be one of intoxicating liquors. The Government made out a case of forfeiture when there was proof that the cargo was something other than fish. Forfeiture under section 26 of the National Prohibition Act is one of the consequences of a successful criminal prosecution of a personal offender, and is ancillary thereto. Forfeiture under the Revised Statutes, section 4377, for breach of the navigation laws, is strictly *in rem,* and is not dependent upon a preliminary adjudication of personal guilt. . . In brief, the basis of the charge of guilt directed against this vessel is not a breach of the National Prohibition Act nor any movement of transportation, lawful or unlawful. It is the act of engaging in a business other than the fishing trade in contravention of a license.

The *General Import Co. case* involved the libel of a vessel for failure to produce a manifest while carrying an unmanifested cargo of liquors. The libel was filed under sections 584 and 594 of the Tariff Act of 1922. The District Court dismissed for the reason that section 26 of the Prohibition Act provided the exclusive system of forfeiture. The Circuit Court of Appeals, distinguishing the *"Ruth Mildred" case,* gave judgment for the Government. The basis for this distinction, in addition to the propriety of affirmance for the reasons stated in *General Motors Acceptance Corporation case,* was thus stated:

> The Circuit Court of Appeals advanced the view that the suit was not strictly one for the forfeiture of the vessel, but one for the enforcement of money penalties charged upon the vessel by reason of the misconduct of the master. On this ground it distinguished its own decision in the case of the "Ruth Mildred," announced at the same time, and gave judgment for the Government.
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> For that reason as well as for the broader reasons stated in No. 574, General Motors Acceptance Corporation and others against the United States, and No. 795, the United States against the "Ruth Mildred," decided herewith, the decree will be affirmed.

The *Commercial Credit case* involved a libel under sections 3061 and 3062 of the Revised Statutes, being ancillary to the Tariff Act, against three automobiles seized near the Mexican border on the charge of unlawful importation of liquors. The Commercial Credit Corporation, a holder of a chattel mortgage on the cars, intervened and alleged that its lien had been created in good faith, and that it was innocent of participation in the wrongful use of the cars. Affirming the District Court's ruling that the forfeiture remedy had not been repealed by the Prohibition Act, and reversing the Circuit Court of Appeals decree to the contrary, MR. JUSTICE CARDOZO discussed the additional question as to whether the vehicles were employed in unlawful importation. As to this he said:

> The cars subjected to forfeiture in No. 574 were the same that had brought the contraband merchandise from beyond the Mexican border. The cars libeled in this proceeding were laden with the liquors, for all that the evidence shows, on this side of the border line.
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> The difference is not one that exacts differing relief. The circumstantial evidence justifies a finding that the cars, wherever laden, were implements or links in a continuous process of carriage from Mexico into Texas. This was unlawful importation as well as unlawful transportation.

MR. JUSTICE STONE took no part in the first two cases.

Mr. Assistant Attorney General G. A. Youngquist argued these cases for the Government, and Mr. Duane R. Dills for the Commercial Credit Company, Mr. Milton R. Kroopf for the respondent in the "Ruth Mildred" case and for the petitioner in the General Import and Export Co case.

State Statutes—The Oklahoma Oil Conservation Act

The provisions of the Oklahoma Oil Conservation Act forbidding the production of crude petroleum in such manner or under such conditions as to constitute waste as defined in the Act are valid under the equal protection and due process clauses of the Fourteenth Amendment, and under the commerce clause.

Penal provisions of the Act, authorizing that the property of one guilty of violating the Act be placed in the hands of a receiver for the operation of producing wells and the marketing of the products thereof, are invalid for the reason that the Act fails to define conduct constituting a violation with sufficient certainty to meet the requirements of due process of law.

Champlin Refining Co. v. Corporation Commission, Adv. Op. 725; Sup. Ct. Rep., Vol. 52, p. 559.

This case involved questions relating to the validity of the Oklahoma Oil Conservation Act. The ap-

pellant refining company brought suit in a federal district court consisting of three judges to enjoin enforcement of the Act on the ground that its provisions were repugnant to the due process and equal protection clauses of the Fourteenth Amendment, and to the commerce clause. The district court sustained certain regulatory provisions of the Act, and denied the injunction, but by its decree it held certain penal provisions of the Act invalid. The plaintiff appealed from the portion of the decree upholding the regulatory provisions, and the defendants appealed from the other portion.

The Act prohibits the production of petroleum in such manner or under such conditions as to constitute waste. It defines waste to include, in addition to its ordinary meaning, economic, underground and surface waste, and waste incident to production in excess of transportation or marketing facilities or reasonable market demands, and empowers the commission to make rules and regulations for preventing such waste. It also provides that whenever full production from any common source can only be obtained under conditions constituting waste, one having the right to produce oil from such source may take only the proportion of all that may be produced therefrom without waste as the production of his wells bears to the total. The commission is authorized to regulate the taking of oil from common sources so as to prevent unreasonable discrimination in favor of one source as against others. Pursuant to the statute the commission has made "proration orders" from time to time.

In the findings of fact it appeared that the plaintiff engages in producing, refining, transporting and marketing crude oil and its products. It has oil and gas leases in two fields. All that it can produce will be used for commercial purposes, and it does not use earthen storage or permit its crude to run at large or waste any oil produced at its wells. It also purchases much oil. In one of the fields in which the plaintiff has wells, the Oklahoma City field, there is heavy gas pressure, so that where proportional taking from the wells in flush pools is not enforced, operators who do not have physical or market outlets are forced to produce to capacity in order to prevent drainage to others having adequate outlets. Prior to the passage of the Act quantities of oil produced in excess of transportation facilities were stored in surface tanks, resulting in enormous waste through seepage, rain, fire and evaporation. Uncontrolled flow of flush wells exhausts the pressure, wastes gas, and lessens ultimate recovery.

The commission construes the Act as intended to empower it to limit production to the amount of reasonable daily market demand, and to require ratable production by all taking from a common source. The commission after making findings as to the market outlet for oil in the Oklahoma field, that is the amount that could be produced without waste, by proration order limited the plaintiff to the production of about 6 per cent of the total production of its wells in that field. It also restricted the plaintiff to less than potential production in the other field, i. e., the Seminole pools.

The commission's proration orders were not made to fix the price of crude oil, nor had any of them that effect, nor was production ever restricted to less than market demand, and since the time of the first proration order until the time of the trial the price had dropped from more than two dollars a barrel to thirty-five cents.

Accepting the findings of the trial court as supported by the evidence, the Supreme Court, in an opinion by MR. JUSTICE BUTLER, first considered the contentions of the plaintiff that the Act is repugnant to the due process and equal protection clauses of the Fourteenth Amendment. In this connection it was pointed out that the orders do not purport to have been made in respect of services or charges subject to regulation because affected with a public interest.

The characteristics of oil and gas and the effect of their unrestricted production were then discussed to demonstrate to propriety of regulating such production to prevent waste.

> Plaintiff insists that it has a vested right to drill wells upon the lands covered by its leases and to take all the natural flow of oil and gas therefrom so long as it does so without physical waste and devotes the production to commercial uses. But if plaintiff should take all the flow of its wells, there would inevitably result great physical waste even if its entire production should be devoted to useful purposes. The improvident use of natural gas pressure inevitably attending such operations would cause great diminution in the quantity of crude oil ultimately to be recovered from the pool. Other lessees and owners of land above the pool would be compelled, for self-protection against plaintiff's taking, also to draw from the common source and so to add to the wasteful use of lifting pressure. And because of the lack, especially on the part of the non-integrated operators, of means of transportation or appropriate storage and of market demand, the contest would, as is made plain by the evidence and findings, result in surface waste of large quantities of crude oil.
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> In Oklahoma, as generally elsewhere, land owners do not have absolute title to the gas and oil that may permeate below the surface. These minerals, differing from solids in place such as coal and iron, are fugacious and of uncertain movement within the limits of the pool. Every person has the right to drill wells on his own land and take from the pools below all the gas and oil that he may be able to reduce to possession including that coming from land belonging to others, but the right to take and thus to acquire ownership is subject to the reasonable exertion of the power of the State to prevent unnecessary loss, destruction or waste. And that power extends to the taker's unreasonable and wasteful use of natural gas pressure available for lifting the oil to the surface and the unreasonable and wasteful depletion of a common supply of gas and oil to the injury of others entitled to resort to and take from the same pool.

The plaintiff's contention resting on the claim that § 2 or § 3 of the Act contemplates the regulation of the price of crude oil was rejected, since no order has been made relating to price-fixing, and since the remaining portions of the Act would not be inoperative by reason of the invalidity of § 2.

The contention that the orders operate to burden interstate commerce in violation of the commerce clause was also rejected, on the ground that the regulations in question apply to production and not to transportation.

Nor was the contention that the orders were arbitrary upheld. In regard to this, the Court considered the plaintiff's objection that agents of the commission, assisting in enforcement of the statute, were paid out of funds raised by certain operators interested in having proration enforced under the statute. Pointing out that there was no showing that these agents had acted wrongfully, the Court said:

> Plaintiff assails the proration orders as unauthorized, lacking basis in fact and arbitrary. But it failed to show that the orders were not based upon just and reasonable determinations of the governing facts: namely, that proportion of all crude oil, which may be produced from a common source without waste, that the production of plaintiff's wells bears to the total production from such source.

Gauges were taken to determine the potential production of each well under rules and regulations prescribed by the commission and not shown to be inappropriate or liable to produce arbitrary or discriminatory results. It does not appear that the agents—umpires and committees—employed by the commission with the consent of the governor to enforce the provisions of the Act, did more than to make investigations necessary to secure for the commission data required to make the proration directed by § 4 or that they acted otherwise than as faithful subordinates. Plaintiff has not shown that any act or omission of these agents subjected it to any disadvantage or that the prorations were arbitrary or discriminatory in any respect. Obviously the commission, without agents and employees, could not make or enforce proration as directed by the Act. The plaintiff is not entitled to have the commission's orders set at naught and the purposes of the Act thwarted merely because, in the absence of legislative appropriations therefor, the salaries and expenses of agents or employees were paid out of funds raised by operators interested in having proration established under the statutory rule.

The validity of certain of the penalty provisions was then considered. The provisions in § 8 of the Act, imposing penalties and jail sentences on persons violating the Act, were found not properly raised for decision as to their validity and the decree was modified accordingly, in that regard.

The provisions of § 9, however, relating to receivership proceedings in case of violation of the Act, were so presented as to require decision. These provisions, held to be penal in their nature, were held invalid, for the reason that the definitions of waste contained in the Act are too uncertain to meet the requirements of due process of law.

In *Connally v. General Construction Co.*, 269 U. S. 385, 391, this court has laid down the rule that governs here: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The general expressions employed here are not known to the common law or shown to have any meaning in the oil industry sufficiently definite to enable those familiar with the operation of oil wells to apply them with any reasonable decree of certainty. The meaning of the word "waste" necessarily depends upon many factors subject to frequent changes. No act or definite course of conduct is specified as controlling and, upon the trial of one charged with committing waste in violation of the Act the court could not foresee or prescribe the scope of the inquiry that reasonably might have a bearing or be necessary in determining whether in fact there had been waste. It is no more definite than would be a mere command that wells shall not be operated in any way that is detrimental to the public interest in respect of the production of crude oil. And the ascertainment of the facts necessary for the application of the rule of proportionate production laid down in § 4 would require regular gauging of all producing wells in each field, a work far beyond anything that reasonably may be required of a producer in order to determine whether in the operation of his wells he is committing an offense against the Act.

In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all.

The case was argued by Messrs. Harry O. Glasser and James M. Beck for the appellant, and by Messrs. W. P. Z. German and John H. Miley for appellees.

Injunction—Obligation to Exhaust Legal Remedies —Administrative Law—Review of Order of Investment Commissioner under Montana Blue Sky Law

A federal court should not enjoin enforcement of an order of the Investment Commissioner under the Montana Blue Sky Law, made under his statutory authority to revoke a permit to engage in an investment business which appears to him to be conducted in "an unsafe, inequitable or unauthorized manner," when the complainant has failed to exhaust his administrative remedy under the state statute, by resort to the state courts to modify, vacate, or set aside the order complained of.

Porter v. Investors Syndicate, Adv. Op. 783; Sup. Ct. Rep., Vol. 52, p. 617.

This opinion, by MR. JUSTICE ROBERTS, related to the procedure provided by statutes of Montana to review orders of the Investment Commissioner of that State. The district court, specially constituted, had enjoined the revocation of the appellee's permit to do business on failure to obey an order of the Commissioner directed against it, but on appeal the decree was reversed upon the ground that the appellee had an administrative remedy satisfying the constitutional requirements of due process of law, which it had not exhausted.

The appellee is a Minnesota corporation engaged in selling investment certificates in Montana under license from the Investment Commissioner of the latter State. The purchaser of certificates is entitled to receive their face value on a stated date; the assumption is that installments of principal paid in will be augmented by interest compounded at 5½ per cent, so that the company will be able to pay the face value before the holder's payments reach that total.

The "Blue Sky Law" of Montana, requires investment companies to obtain permits from the Investment Commissioner in order to do business within the State. The Commissioner is directed to issue or refuse a permit depending on his determination that the applicant is solvent, and that its proposed plan of business is "fair, just and equitable." The permit of any investment company may be revoked under the statute, among other grounds, whenever it shall appear to the Commissioner that the assets of the company are impaired to such an extent that the assets do not equal liabilities, or that the company is conducting its business "in an unsafe, inequitable or unauthorized manner."

The statute further provides that any interested party who has appeared, dissatisfied with any finding or decision of the Commissioner, may within 30 days after the making thereof, institute action against the Commissioner in any Court of competent jurisdiction to vacate and set aside such finding or decision as unjust or unreasonable. It is further provided that:

"The rules of pleading and procedure in such action shall be the same as are provided by law for the trial of equitable actions in the district courts of this state and on the hearing the judge of said court may set aside, modify or confirm said findings or decision as the evidence and the rules or equity may require. Appeals may be taken from the decision of the district court to the Supreme Court by either party in the same manner as is provided by law in other civil actions. Pending any such action, the said findings or decision of said Commissioner shall be prima facie evidence that they are just and reasonable and that the facts found are true, and pending any such action the said findings or decision of the Commissioner shall remain in full force and effect. If no action be brought to set aside

said findings or decision within thirty days, the same shall become final and binding."

The appellee issued a form of certificate providing that in case of default in current payments during the first 18 months the purchaser should forfeit all sums paid; for default thereafter, where payment of $148 on a $1,000 certificate has been paid, the holder is entitled to withdraw $42; after 4 years and payment of $370, the refund is $254; and after 5 years the purchaser is entitled to repayment of the whole amount paid, but without interest.

The Commissioner ordered a hearing on notice to the appellee and others similarly engaged, and after hearing, at which the appellee appeared and stated its objections, the Commissioner promulgated a rule forbidding the issuance of certificates without certain provisions as to withdrawals. The rule thus promulgated allowed withdrawals on conditions more favorable to purchasers than as provided in the certificates, and the Commissioner claimed authority thus to act under the provision empowering him to revoke permits when it shall appear to him that the investment company is "conducting its business in an unsafe, inequitable or unauthorized manner." He threatened to revoke the appellee's permit if it failed to obey the rule, and thereupon the appellee brought this suit in the Federal Court to enjoin revocation of its permit.

The court granted an injunction on the ground that the act violates the due process clause of the Fourteenth Amendment, as lacking provision for notice or hearing before revocation of a license, because it fixes no standard for determination of adequate cause for revocation; and also because it delegates legislative power contrary to the State Constitution.

The appellant, assigning these rulings as error, contended further that the court had no jurisdiction. The Supreme Court upheld the latter contention, so that it was unnecessary to consider the other questions raised.

> We are of opinion that the appellee failed to exhaust its administrative remedy before applying to the District Court for injunctive relief. The granting and revocation of permits is an exercise by the appellant of delegated legislative power. Section 4038 of the Code *(supra)* confers on any interested person dissatisfied with a finding or decision by the commissioner, the right within thirty days to bring an action against him in a state district court to vacate his order and set it aside as unjust or unreasonable, and directs that on the hearing the judge "may set aside, modify or confirm said . . . decision as the evidence and the rules or (sic) equity may require." The section confers the right to appeal to the State Supreme Court from the judgment of the trial court. Clearly the function of the state district court under the statutory mandate is not solely judicial, that is, to set aside a decision of the commissioner if arbitrary or unreasonable and hence violative of constitutional rights. The duty is laid on the court to examine the evidence presented and either to set aside or to modify or to affirm the commissioner's order, as the proofs may require. The legislative process remains incomplete until the action of that court shall have become final. . . And the capacity in which the court acts is none the less administrative because the proceeding is designated as a suit in equity instead of by appeal. . . When the appellee was notified on June 22, 1931, that the rule adopted by the appellant would become effective July 22nd of the same year, an action could have been filed in the state court and a hearing had upon all questions of fact and law touching the propriety and legality of the order.

The Court also considered the contention that the statute violates the requirements of due process by forbidding the state court to afford interlocutory relief. An examination of the statute, and the absence of any state court decision construing it as denying interlocutory relief, led to a rejection of this contention as based upon an erroneous interpretation of the Act. The applicable rules, depending on whether a stay is or is not afforded, were thus stated:

> Where as ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. . . But where either the plain provisions of the statute . . . or the decisions of the state courts interpreting the act . . . preclude a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified.

In conclusion it was pointed out that the review of the Commissioner's action is not judicial in character, so that those cases are inapplicable which hold that pursuit of judicial review in the state courts is not required before the jurisdiction of the federal courts can be invoked.

The case was argued by Mr. T. H. McDonald for the appellant, and by Mr. M. S. Gunn for the appellee.

Linguistic Innovations in Documents

(From October Law Notes)

THE AMERICAN BAR ASSOCIATION JOURNAL in its July and September issues has taken exception to the increasing use in legal documents of the symbol "and/or," with which we heartily agree. Those favoring the use of this verbal device argue that it fills a place in our language as a brief form of expressing the meaning that the words separated thereby may be construed either in the conjunctive or disjunctive. Linguistic innovations in documents wherein clarity and precision are prime requisites certainly may be justified only by actual necessity, and no such plea is available to support this device, since it is impossible to frame a sentence containing it where the same meaning cannot be conveyed by words of accepted usage. Commercial practice of course tends in this hurried age to symbols in which brevity is the goal, and has already inflicted on the language "C. O. D.," "C. I. F.," and half a score of other cryptic innovations, but their adoption in the vocabulary of the law is to be deprecated.

Liability of Executor for Testamentary Libel

(From October Law Notes)

Only three cases involving the liability of an executor for testamentary libel are found in the reports. The latest is Hendricks v. Citizens, etc., Nat. Bank, (1931) 43 Ga. App. 408, 158 S. E. 915, which was a suit against the executor of Mrs. Hendricks for the recovery of damages alleged to have been sustained by reason of a libel contained in the testatrix's will, which, by innuendo, charged the petitioner with being a bastard. . . . It was said by the court: "Upon consideration of the question, we find ourselves squarely facing a choice between two courses; on the one hand, the orthodox course of adhering strictly to the rigid rule of the common law, which in any case of the character of that before us would do violence to our innate sense of what is fair and right; or, on the other hand, of falling in line with the constantly changing concepts of the law and its administration, by conforming with what appears to be a modern doctrine, 'pure drawn from the fountains of justice.' In the instant case, notwithstanding our natural aversion to do anything in the nature of 'judicial legislation,' we are impelled, in good conscience, to adopt the latter alternative."

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

MR. JUSTICE BRANDEIS, edited by Felix Frankfurter. 1932. New Haven: Yale University Press. It is characteristic of the political system of the United States that the type-figure of a great revolution in political thinking should occur, not in the ranks of the executive or legislative rulers of the country, not among its educationists, not among the leaders or organizers of any class, but among the members of the judiciary. Such a condition could not, perhaps, occur in any other country, for the simple reason that there is no other country in which the permissible directions of self-development of the living body politic are so largely determined by the courts. A judge in any country may be a great judge; in few countries can he be at the same time a great exponent of statecraft.

Appointed to the Supreme Court in 1916, against an almost unprecedented tumult of opposition, Louis D. Brandeis has become in 1932 the recipient of a tribute which must surely be unique in the encomiastic literature of the United States, not for any particular fervor of expression, but for the imposing solidity of its intellectual structure and the authority of the names attached to it. The reason for the change is simple; in the intervening sixteen years the conception of the state entertained by Mr. Justice Brandeis has triumphed over the conception entertained by an earlier generation and finally embodied in the opposition to President Wilson's act in appointing him, and has triumphed largely in consequence of the brilliantly convincing expression given to it by Brandeis himself, at first in a series of acidly destructive dissenting opinions, and recently in opinions which have more and more tended to receive the support of a majority of the court.

It is sometimes felt, perhaps more by outsiders than by Americans, and perhaps without full justification in the facts, that political life in the United States lacks the services of an intellectual aristocracy. Whatever degree of truth there may be in this idea as regards the operations of the legislative and executive branches, there is not a shadow of foundation for it as regards the functioning of the Supreme Court. The triumph of the Brandeis ideas has nothing whatever to do with popular politics. It has been effected by pure intellectual persuasion, exercised in an atmosphere of Olympian calm from which scarcely a sound ever reaches the ears of the man in the street, who goes his way sublimely unaware that the very shape of his government is being gently reconstructed over his head and those of his elected representatives.

The extent of the power of this intellectual aristocracy (of which, of course, the Supreme Court is merely a sort of focus, and which includes the whole body of eminent jurists and thinkers who influence the minds of the Justices) is almost incredible to dwellers in other countries where the corresponding element has to function much more largely through the machinery of the popularly elected bodies. The chief problem of all systems of government in the last fifty years has been that of accommodating themselves to the enormously changed economic conditions resulting from cheap transportation and rapid communication—chief among the changes being the rise of the great and impersonal corporation. This is the problem to which the Brandeis mind was directed for thirty years prior to his appointment, and with which it has been chiefly concerned since that appointment. His approach to it is peculiarly pragmatic, and fundamentally different from that which a casual observer might suppose to be the characteristic American approach in the year 1932. For the absolute good, the thing to be aimed at by all wise governments in the United States, according to the Brandeis theory, is not the maximum production of goods and services, nor the most even distribution of goods and services among the people; it is the maintenance of the maximum amount of individual liberty, such liberty being aptly symbolized in "the right to be let alone."

Most thinking minds will probably agree with Mr. Justice Brandeis that this right is, to citizens of the United States and, generally speaking, to human beings of Western European origin, the most valuable that their government can confer upon them. A large number will also agree with him that this right is most easily maintained in a community whose business enterprises are relatively small, and that it tends to be impaired by the rise of very large economic units, whether socialistic or capitalistic. A somewhat smaller number (in 1932, at any rate) will be able to share his confidence that the small business unit, when given fair treatment by governments, contains in itself, in virtue of the close, direct and competent supervision of its owners, sufficient vitality to enable it to hold the field against Big Business.

This optimistic view of the future rests on two rather far-reaching assumptions. There is, first, the competency of the small business man himself, which possibly requires a somewhat wider distribution of practical intelligence than is necessary under either socialism or Big Business. And then there is the necessity for the most acutely subtle distinctions by governments and courts between desirable and undesirable forms of collectivity. For obviously we cannot afford to suppress all large organizations merely because they are large. In the words of one of the contributors to this volume, "Corporations and trade-unions may both be, in the specific instance, good or bad. What determines that is not an *a priori* ethical

theory but an ethical judgment of their motivation and their consequences."

A less optimistic mind would recoil before the magnitude of the task thus imposed upon governments and courts, of effecting this differentiation. The Brandeis concept has brought within the cognizance of the Supreme Court, and therefore in some degree of all the courts, a mass of non-legal facts, constituting what may be termed the "context" of the particular case, and relating to the whole social and economic consequences of the acts under review by the court, which must vastly exceed anything that any judicial body has heretofore been required to consider. The result may be all right in a bench adequately supplied with Brandeises; but even so, the appalling complexity of this "context" must surely result in a very undesirable degree of uncertainty as to the validity and significance of legislation, enacted or proposed. It is desirable that interpreters of the law should take into consideration relevant facts in the order of their relevancy; but it is also desirable that the relevant facts should not be so numerous as to make their decisions unpredictable in almost every conceivable case.

Mr. Justice Brandeis has taught the Supreme Court to concern itself "about the ends sought to be remedied by the legislation, the social need for it, the character and extent of the public opinion behind it, the psychological *milieu* in which it was passed, its possible consequences." In difficult cases "he appeals to the experience in other states or countries, to the consensus of practice within relevant groups, or to the consensus of enlightened opinion." In most countries these considerations are dealt with by the legislators, who have the advantage that if they do not like the results of their decision they can reverse it at any time. The practice of dealing with them by courts, or even by a single court, seems to contain its dangers.

The papers in this volume are contributed by Max Lerner, Felix Frankfurter, Donald R. Richberg, Henry Wolf Biklé and Walton H. Hamilton, and are preceded by a short but penetrating tribute by Chief Justice Hughes, and a still briefer and charming Introduction by Mr. Justice Holmes.

B. K. SANDWELL.

Westmount, Quebec.

The Government in Labor Disputes. By Edwin E. Witte. 1932. New York: McGraw-Hill Book Company. Pp. xi, 352.—Ever since the famous Debs case of the nineties the public has been deluged with books, articles, speeches and news-stories built around the role which the government has played in labor disputes, particularly with reference to the use of injunctions. For the most part, however, these accounts have been of little value, coming either from friends of labor who have vehemently denounced the use of the injunction, from employers who have enthusiastically supported its use, or from newspapers which in all too many instances have failed in accuracy of reporting. In view of this unsatisfactory background, Dr. Witte's new book will be warmly welcomed by all interested in the labor movement. The book is well written, scientific and readable, and with the exception of the last chapter, which is saved for the author's own reflections, it is a thoroughly objective account.

Beginning with a chapter which points out the public's stake in labor disputes, Dr. Witte recounts very carefully the prevailing judicial attitude toward labor unions and union activities as reflected in court decisions. This covers the legality of strikes, picketing, trade agreements, boycotts and the other institutions peculiar to the labor dispute. Following this is a splendid chapter on legal theories underlying the court decisions and full treatments of statutory regulations, injunction procedure, criminal prosecutions incident to labor disputes, violence and means used to prevent it, and provisions for the peaceful settlement of disputes. In one chapter the author discusses restrictions on employers and in another relates the numerous proposals which have been directed toward the emancipation of labor from unjust restriction.

Perhaps the most valuable chapter is the one discussing the results of injunction issuance, in which it is pointed out that injunctions are less successful than generally alleged, being of little value when used against the primary boycott, picketing and strikes, and then largely because of confusion and panic induced in the minds of the workers. A more far-reaching and important result is indicated in the weakened prestige enjoyed by the courts and the belief on the part of the workers that the courts are operated and controlled for the convenience of the employing classes.

The chapter on injunction procedure is well done, but is marred by errors and shortcomings of minor importance. Contrary to Dr. Witte's statement, injunctions were used, though not extensively to be sure, before the 1880's. It is said that *ex parte* restraining orders are "very much a matter of course" in non-labor injunction cases,—testimony which definitely conflicts with the reviewer's knowledge based on a study of half a hundred non-labor cases. It is implied, at least, that time is the essence of success in labor disputes, but only scant information is given regarding the extent and duration of delays in injunction actions. Indeed, the value of the information given is minimized by the use of *average* rather than *median* time figures. On page 100 it is said that for an alleged violation of an injunction order, the court upon receipt of affidavits "issues an order for the arrest of the alleged contemnors." Typically, the court issues an order to show cause only, leaving it up to the defendant's attorney to appear with the defendant. Arrests are generally not made for injunction violation except under statutes making contempt of court a misdemeanor,—statutes which, in New York State at least, have been used only recently.

The chapter on violence and law enforcement is very well done, being a discussion of the role of police, military forces and strike guards in labor disputes. The emphasis on the bitterness resulting from the use of many of these law enforcement agencies is well placed. The chapter falls short, however, of indicating the extent to which the attitude of city police may influence the success or failure of an industrial struggle.

It should be reiterated that these shortcomings are of minor importance and should not, therefore, be considered as materially lessening the value of the study. On the contrary, the book is by all odds the most valuable in the field and should be carefully read by everyone—whether lawyer, layman or student—who claims a serious interest in the labor movement.

University of Nebraska. CLEON O. SWAYZEE.

GEORGE WASHINGTON AND THE TORIES

The Father of His Country Displayed Something of a Judicial Temperament in Dealing with the Vexatious Problems Created by the Loyalists—If They Were not Trying to Harm the Patriot Cause, He Was Willing to Let Them Alone, But if They Were, He Was for Vigorous and Stern Action—"Far Be It from Me to Add to the Distresses of a Lady," He Gallantly Wrote to a Tory Matron on One Occasion

By H. O. Bishop
Of the George Washington Bicentennial Commission

FIGHTING the British was only a portion of the big task that was assigned to General Washington by the Continental Congress. The remainder consisted in the annoying, puzzling and bedeviling job of handling that portion of the population known as Tories.

Washington was obliged to exert more ingenuity than that famous "Philadelphia lawyer"—whoever he was—in dealing with this situation. The fact that that phase of our Revolutionary history has occasioned so little talk and literature during the intervening years is proof conclusive that George Washington possessed both a legal and judicial temperament—plus a good deal of good old-fashioned horse-sense.

Most people seem to be under the impression that the great majority of the population at that time was lined up in favor of the patriotic cause and that the Tories (or loyalists as they designated themselves), consisted of a small minority.

That was not the case.

The Tories always maintained that in the country as a whole they were in the majority, while John Adams and other Patriot leaders insisted that these enemies were only about a third of the population. The probabilities are that Adams was more nearly correct in his estimate. It is generally conceded that there were more Tories in Pennsylvania than in any of the other Colonies. In South Carolina and Georgia they outnumbered the Patriots. In North Carolina there was about an equal division. They were numerous in Maryland, Delaware, New Jersey and New York, although ontnumbered by the Patriots. In Virginia and New England the Patriots were decidedly in the majority.

In Virginia and New England, where the Patriots predominated, the population was almost exclusively British—94 per cent in Virginia and 99 per cent in New England. The British likewise predominated in South Carolina where the Tories outnumbered the Patriots. The racial mixture which characterized the situation comes to the forefront when it is stated that New York was 16 per cent Dutch and Pennsylvania 26 per cent German. Included among the Tories were all classes of people. In New England they included a large number of the better educated and substantial citizens, professional men and occupants of public offices.

All of the states eventually enacted drastic laws against these thousands of people who could not see their way clear, some for one reason and some for another, to follow in the footsteps of Washington and the other Patriots. Their course brought them no end of unhappiness, misery, suffering and tremendous loss of property. According to reliable estimates more than 200,000 left this country during the prosecution of the Revolution or shortly thereafter. About 50,000 fled to Canada and established themselves in the Maritime Provinces. Their property was confiscated in all of the States. In New York, for instance, their property at forced sale brought over $3,500,000.

In handling this vexatious problem Washington, whenever it was possible to do so, disposed of each case on its own individual merits. To him law was a flexible instrument, not a hard and stiff thing, but adjustable to circumstances and necessities of the moment. He could be as hard as a chunk of granite or as gentle as a lamb as the occasion demanded. In other words, Washington had no quarrel with the Tories just because they differed in opinion with him. That, he realized, was their inherent right, and as long as they attended to their own business he treated them like brothers. But when they attempted to cooperate with the British military forces and did everything in their power to bedevil and defeat the patriot cause he clamped down on them.

I will give a few examples of the way the two kinds of Tories were treated. One of the best friends Washington ever had was old Lord Fairfax, the owner of millions of acres of land in Virginia. He was the man who gave Washington his start as a surveyor. He hired him, when a lad of sixteen, to come over the Blue Ridge Mountains and survey his fertile lands in the Valley of the Shenandoah. This was the substantial beginning of Washington's great career. When the troublesome days of the Revolution came along Fairfax pondered over the situation for days and weeks, but could not bring himself to see things through the eyes of Washington and his followers. Loyalist he was and loyalist he remained the rest of his days. But he had the good sense to "say nothing and saw wood." All through the Revolution he retained the love and respect of his fellow-Virginians. Not once was he mistreated or his property destroyed. Nevertheless, he keenly regrettd the break with Mother England. When news reached him that Cornwallis had surrendered to Washington at Yorktown and that the long struggle was virtually

over, he decided that he was through. Turning to his servant, Old Joe, he said: "Help me to my bed. It is time for me to die." And he did.

Things up at Boston were quite different. The Tories there neither sawed wood nor kept their mouths closed, according to Washington. In a long and very remarkable letter to his brother, John Augustine Washington, telling of the evacuation of Boston, he made these terse comments about the local enemies:

"All those who took upon themselves the style, and title of government men in Boston, in short, all those who have acted an unfriendly part in this great contest have shipped themselves off in the same hurry, but under still greater disadvantages than the King's troops have done; being obliged to man their own vessels (for seamen could not be had for the transports for the King's use) and submit to every hardship that can be conceived. One or two have done, what a great many ought to have done long ago, committed suicide. By all accounts there never existed a more miserable set of beings than those wretched creatures now are; taught to believe that the power of Great Britain was superior to all opposition, and that foreign aid (if not) was at hand, they were even higher and more insulting in their opposition than the Regulars. When the order issued therefore for embarking the troops in Boston, no electric shock, no sudden clap of thunder; in a word the last Trump, could not have struck them with greater consternation. They were at their wits end, and conscious of their black ingratitude chose to commit themselves in the manner I have above described to the mercy of the waves at a tempestuous season rather than meet, their offended countrymen. But with this declaration the choice was made that if they thought the most abject submission would procure them peace they never would have stirred."

Now please notice the following lawyer-like statement contained in a letter to the Massachusetts legislature:

"It has been suggested to me that in the town of Boston, etc., there is a good deal of property belonging to refugees and such other inimical persons, as from the first of the present dispute, have manifested the most unfriendly disposition to the American cause; and, that part of this property is in such kind of effects, as can easily be transported, concealed, or changed. I submit to you, therefore, gentlemen, the expediency of having an enquiry made into the matter, before it is too late for redress, leaving the decision thereupon (after the quantum, or value, is ascertained, and held in state of durance) to the consideration of a future day. I have ordered that no violence be offered by the soldiery, either to the persons, or property of those peoples; wishing that the matter be taken into consideration by your honorable body, and in such a way as you shall judge most advisable."

The temperature beneath General Washington's collar must have been pretty high when he wrote a letter to General John Sullivan telling him to go to Portsmouth, New Hampshire, and set things straight. The following is an excerpt from that peppery epistle:

"As great calamities and distress are brought upon our seaport towns, through the malicious endeavors and false representations of many persons, holding commissions under the Crown, who, not content with bringing destruction upon some of our principal towns, are yet using every art that malice can devise to reduce others to the same unhappy state; in hopes, by such diabolical and cruel conduct to please an arbitrary and tyrannical ministry, and to receive from them in return, a continuance of such places and pensions as they now hold at the expense of the blood and treasure of this distressed continent. You are, therefore, immediately upon your arrival in that Province, to seize such persons as hold commissions under the Crown and are acting as open and avowed enemies to their country, and hold them as hostages for the security of those towns, which our ministerial enemies threaten to invade."

To William Ramsay he wrote a letter containing this pungent paragraph:

"I think as you do, that it is high time a test act was prepared and every man called upon to declare himself; that we may distinguish friends from foes; nor have I any idea of a set of men being exempt from the common duties of society in any country or community where they have been fostered in the sweet enjoyment of its liberties."

In a letter to Nicholas Cooke, the Commander-in-Chief told of having received a letter from Governor Trumbull, of Connecticut, telling of an Act passed by the Assembly of that State providing "for restraining and punishing persons inimical to us and directing proceedings therein. No person to supply the ministerial army or navy; to give them intelligence; to enlist or procure others to enlist in their service, to pilot their vessels, or in any way assist them; under pain of forfeiting his estate, and an imprisonment not exceeding three years. None to write, speak or act against the proceedings of Congress, or their Acts of Assembly, under penalty of being disarmed and disqualified from holding any office, and be further punished by imprisonment, etc. For seizing and confiscating, for the use of the Colony, the estates of those putting, or continuing to shelter themselves under the protection of the ministerial fleet or army, or assist in carrying on their measures against us."

Washington had anything but a warm spot in his heart for Governor Tryon, of New York. To Major-General Charles Lee he wrote, in part, as follows:

"There is good reason to believe that Tryon has applied for some troops, and that he would join them with a great number of inhabitants; so that you will see the necessity of your being decisive and expeditious in your operations in that quarter. The Tories should be disarmed immediately, though it is probable that they may have secured their arms on board the King's ships, until called upon to use them against us. However, you can seize upon the persons of the principals. They must be so notoriously known, that there will be little danger of your committing mistakes, and happy should I be if the Governor could be one of them."

To the Governor of Rhode Island Washington inquired whether it would not be "prudent to seize on those Tories, who have been, are, and that we know will be active against us? Why should persons, who are preying on the vitals of the country,

be suffered to stalk at large, whilst we know that they will do us every mischief in their power."

More than once Washington bitterly complained of the "diabolical and insidious arts and schemes carried on by the Tories to raise distrust, divisions and dissensions among us."

The injurious activities of the Tories in Pennsylvania were an every-day thorn in the flesh of Washington.

Lord Cornwallis found himself in an unpleasant situation when he surrendered to Washington at Yorktown. Among his troops were quite a number of Tories, or "Loyalists" as he designated them. The thought of being turned over to the tender mercies of the Patriot soldiers caused their cardiac pumping stations to work triple-time. Cornwallis tried to help them out by inserting a clause in the Articles of Capitulation to the effect that the Loyalists should not be punished on account of having joined the British army. This suggestion did not appeal to Washington. He laconically remarked that it was a civil and not a military question.

After considerable powwowing Washington evidently decided that no good purpose would be served in permitting the landscape of Virginia to be cluttered up with a parcel of New York Tories. The proposition was disposed of by allowing Cornwallis to send a ship to New York with the news of his surrender and such troops as he might care to send on it. Shivering and huddled together on this boat the troublesome "enemies within the gate" were permitted to go far, far away from Washington's victorious army.

Many more instances could be given of Washington's trials and tribulations with the Tories during the Revolutionary struggle. But I will close with only one more. It portrays the great leader in the role of gentleness and kindliness when such action was warranted and possible. The authorities of the state of New York had taken drastic action against the Tories, including the seizure of their livestock. Mrs. Philipse, whom Washington had known in previous years, wrote him a letter appealing from this action, explaining that the taking of all her cattle would cause suffering in her household. To this letter Washington made the following diplomatic and neighborly reply:

"Madam,

"The misfortunes of war, and the unhappy circumstances frequently attendant thereon to individuals are more to be lamented than avoided, but it is the duty of every one to alleviate these as much as possible; far be it from me then, to add to the distresses of a lady, who I am but too sensible, must already have suffered much uneasiness, if not inconvenience, on account of Colonel Philipse's absence.

"No special order has gone forth from me, for removal of the stock of the inhabitants; but from the nature of the case, and in consequence of some resolutions, of the Convention of this State, the measure has been adopted. However, as I am satisfied it is not meant to deprive families of their necessary support, I shall not withhold my consent to your retaining such parts of your stock as may be essential to this purpose; relying on your assurances and promise that no more will be detained. With great respect, I am, Madam, etc.

"GEORGE WASHINGTON."

Do you imagine that anyone under similar circumstances, could have written a more satisfactory letter to all parties concerned?

IS SWIFT VS. TYSON AN ARGUMENT FOR OR AGAINST ABOLISHING DIVERSITY OF CITIZENSHIP JURISDICTION?

BY CHARLES N. CAMPBELL
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IN the Journal of the American Bar Association for July, 1932, there is published the address delivered by the Hon. John J. Parker of the United States Circuit Court of Appeals for the Fourth Circuit, before the Georgia Bar Association on the subject "The Federal Jurisdiction and Recent Attacks Upon It." The attacks referred to had at that time gone so far as to prompt the introduction in Congress of several bills to take away or greatly limit the jurisdiction of the Federal Courts in so far as such jurisdiction depends on diversity of citizenship of the litigants.

One of the arguments advanced by Judge Parker against the proposed legislation (p. 438) is as follows:

"Almost as important as either of the foregoing considerations is the fact that the abolition of the diversity of citizenship jurisdiction will destroy the uniformity of decision throughout the United States in matters of general law which, beginning with Swift v. Tyson, 16 Peters 1, has gradually been built up through the years. The doctrine is now well established that in matters of general law such as contracts, agency, negotiable instruments, insurance, negligence, torts, etc., the courts of the United States will follow their own decisions and not those of the several states. The result of this has been the creation of a great body of decisions of the federal courts upon the basis of which a lawyer can advise his client with assurance as to his rights. Destroy the jurisdiction based on diversity of citizenship and this uniformity of decision is destroyed." * * * "For years the federal courts have been a powerful influence towards uniformity; but the destruction of their jurisdiction based on diversity of citizenship will mark the end of their usefulness in this field."

While many of the bar may regard with disfavor legislation abolishing or greatly limiting the jurisdiction of federal courts, in so far as it is based on diversity of citizenship, yet it seems to the

writer that the reasoning of Judge Parker, instead of being an argument against such legislation is in reality one of the most powerful ones that can be advanced in favor of it. The basis of his reasoning is of so much importance to the public generally that it should be carefully examined and analyzed to determine whether the rule of Swift v. Tyson is actually tending to promote uniformity of decisions. That there may eventually come uniformity of decisions in the *federal courts*, once the Supreme Court has passed on a question, can hardly be doubted; that there can never be uniformity of decision between the state and federal courts so long as Swift v. Tyson is adhered to seems equally as clear.

The question may be stated as follows:

On a matter not covered by statute, if the Supreme Court of a state, exercising its functions under the Constitution of that state of interpreting and declaring its common law, has declared the law to be so and so, has a federal court sitting in that state the right (as distinguished from the power) to say that the Supreme Court of that state has wrongly or incorrectly declared what the common law of that state is? The federal courts have, since Swift v. Tyson, claimed the right so to rule, but is it not apparent that the exercise of such a right inevitably produces a lack of uniformity in the state and federal rulings?

Two or three much quoted recent cases will illustrate, very effectually the point we have in mind.

In Cole v. Pennsylvania Railroad Co. (C. C. A. 2nd Circuit, 43 Fed. (2) 953) the facts were as follows: Cole's house which did not abut on the right of way of the Railroad Company, was destroyed by a fire negligently set by the Railroad Company and communicated to Cole's house over intervening lots. The Supreme Court of New York had frequently theretofore ruled, (and it was admitted that it was the common law of New York) that under such circumstances there was no liability on the Railroad Company. The suit was brought in the Federal Court for the purpose of recovering damages. The Railroad Company contended that the Federal Court should follow the common law of New York as it was declared by the Supreme Court of New York to be, but Cole contended on the other hand that as this was a matter of general law the Federal Court was not bound by the New York decisions but was free to exercise its independent judgment as to what the common law of New York in that particular was. Judge Hand very reluctantly, as is evident from a reading of his opinion, declined to be bound by the New York rule and held that under Swift v. Tyson he should exercise an independent judgment; he concluded that the Supreme Court of New York had wrongly declared the common law of that state and the Railroad Company was accordingly held liable.

It seems to the writer that the Supreme Court of New York, in holding the company not liable, did not follow the weight of authority as to the common law touching this subject, but that the non-liability of the Railroad Company was the common law of New York until modified by the Legislature of New York. We do not know of any right in any branch of the Federal government to change the common law of any state in the Union.

Had the suit been in the State Court of New York; if there had not been diversity of citizenship in the parties litigant creating federal jurisdiction, the decision would have been exactly the reverse. We may, therefore, confidently expect that there will be exactly this lack of uniformity and the Railroad Company will be liable or not liable, (depending upon whether the suit is in the State or Federal court) until the end of time. Certain it is that the New York Court will not recede from its ruling, and it is equally as certain that the Federal courts will not voluntarily recede from Swift v. Tyson.

Judge Hand in Cole v. Railroad Company, supra, uses this language:

> "The rule of Swift v. Tyson, supra, abounds in difficulties, and its foundations were strongly assailed in Kuhn v. Fairmont Coal Co., 215 U. S. 349, as well as in the dissenting opinion in B. & W. Taxi Co. v. B. & Y. Taxi Co., supra, and elsewhere. The right of a federal court to proclaim a common law which, though ostensibly that of the state, in reality differs from the law which the state courts declare, can be of little practical advantage unless it in the long run tends to promote greater uniformity. When appeals ran from the lower federal courts to the Supreme Court as of right, that court could more frequently than now not only settle the law for all the federal courts, but also impress its views on the state courts so that they would often in the end prevail. But with the pressure of business upon the Supreme Court, which resulted in limiting appeals as a matter of right, relatively few cases where rights under the Federal Constitution and statutes are not involved are likely to get beyond the Circuit Courts of Appeals. Consequently there is much less chance than formerly of securing or even promoting uniformity through the decisions of the Supreme Court. That there are serious objections to having the rights of litigants in the same territory depend on whether they select a federal or a state court cannot be doubted. Justice Miller, though dealing at the time with a case where the law of real property was involved, remarked that to administer a different law is "to introduce into the jurisprudence of the state . . . the discordant elements of a substantial right which is protected in one set of courts and denied in the other, with no superior to decide which is right."

Kuhn v. Fairmont Coal Co. (215 U. S. 349, 54 L. Ed. 228) and B. & W. Taxi Co. v. B. & Y. Taxi Co. (276 U. S. 518, 72 L. Ed. 681) are other striking illustrations of the danger of the doctrine contended for by the federal courts. Had the Taxi Cab case been in the state court of Kentucky, or had Kuhn v. Coal Co. been in the state court of West Virginia, or had Cole v. Railroad Company been in the State Court of New York, the results would have been the reverse in each case, for the Supreme Courts of each of those states had decided the common law of those states to be exactly the contrary of what the federal courts held the common law of those states to be. The Taxi Cab case had to do with whether or not a contract made and to be performed in Kentucky was contrary to the public policy of Kentucky. Kuhn v. Coal Company construed a deed conveying West Virginia real estate, and determined the rights of the parties in that real estate.

Surely it cannot be considered that the rule of Swift v. Tyson tends to promote uniformity of decisions. It has been the subject not only of numerous assaults in inferior federal courts and by learned text writers and annotators, but also of vigorous dissenting opinions by Mr. Justice Holmes, concurred in by one or more of the other Justices of the United States Supreme Court. Mr. Justice

Holmes in the Taxi Cab case uses the following very striking language:

"If I am right, the fallacy has resulted in an unconstitutional assumption of powers by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."

In Hartford etc. Company v. Chicago etc. Company, decided by the Circuit Court of Appeals for the Eighth Circuit in 1895 and reported in 70 Fed. 201, 30 L. R. A. 193, Judge Caldwell, in dissenting, uses the following forceful language:

"The most serious blot on the American system of jurisprudence is that whereby a question affecting the rights and liabilities of a citizen may be differently decided by courts of different governments, whose judgments are equally binding and final. This unfortunate condition of our jurisprudence results from our dual system of government. It has no existence in any other country, and ought to be confined within the narrowest limits possible in this. Nothing can be more repugnant to one's sense of justice, or to a uniform and harmonious administration of the law, than to require the citizen to be bound by conflicting decisions of courts of different governments. Under the operation of this unseemly rule, a suit against one in a state court may be decided one way, and a suit against the same party in the Federal court, involving the very same questions, may be decided the other way. As a result of these diverse rules of decision, each party to a suit engages in an unseemly struggle to get into that jurisdiction whose rules of decision are believed to be most favorable to his side of the case. It was the hope that this court would overrule the decision of the Supreme Court of Iowa in a similar case that caused the removal of this case into the Circuit Court."

The rule of Swift v. Tyson is based on a construction of Section 34 of the Judiciary Act adopted in 1789 and continuing unamended until today. The language of Section 34 is:

"The laws of the several states, except where the constitution, treaties or statutes of the United States otherwise provide or require, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

Mr. Justice Storey, in deciding Swift v. Tyson, held that the word "laws" means "statute laws," and that (with minor exceptions) the federal courts are only bound by state decisions in so far as such state decisions construe statutes of that state.

Some eighty years after Swift v. Tyson was decided an indefatigable seeker for the truth, Mr. Charles Warren, searched among the old archives of Congress, and after great labor succeeded in finding the original draft of Section 34. A photograph of this document accompanies his article in 37 Harvard Law Review 49. In the manuscript as originally prepared the word "statutes" was used; the word "statutes" is crossed out and the word "laws" substituted. His article on the subject is intensely interesting and instructive and his arguments and the extracts from contemporaneous debates quoted would seem to be conclusive that the rule of Swift v. Tyson promotes the very effect that the language of Section 34 was designed to prevent. Nevertheless the Supreme Court in several cases since this discovery by Mr. Warren and its publication has continued to follow Swift v. Tyson; and naturally the inferior federal courts are bound by its decision.

Mr. Justice Holmes in the Taxi Cab Company case says that the rule of Swift v. Tyson is the result "of a subtle fallacy" that some of the federal courts seem inclined to indulge in in assuming that there is a "transcendental body of law outside of any particular state, but obligatory within it unless and until changed by statute"; that the fallacy consists in supposing that there is this outside thing to be found.

What he had in mind was evidently considered by the same court in Wheaton v. Peters, decided in 1834 and reported in 8 Peters 591, 8 L. Ed. 1055. In the course of the opinion of the court Mr. Justice M'Lean says on page 1080:

"It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states, each of which may have its local usages, customs and common law. There is no principle which pervades the Union and has the authority of law that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption.

"When, therefore, a common law right is asserted, we must look to the State in which the controversy originated." . . .

"It is insisted that our ancestors, when they migrated to this country, brought with them the English common law, as a part of their heritage.

"That this was the case, to a limited extent, is admitted. No one will contend that the common law, as it existed in England, has ever been in force in all its provisions in any State in this Union. It was adopted so far only as its principles were suited to the condition of the colonies; and from the circumstances we see what is common law in one State is not so considered in another. The judicial decisions, the usages and customs of the respective states must determine how far the common law has been introduced and sanctioned in each."

That this rule of Swift v. Tyson is promotive of a lack of harmony in judicial decisions and of a chaotic condition of the law, resulting frequently in a citizen of one state being entitled to redress and a citizen of another state not entitled to it, on exactly the same state of facts, depending upon the mere residence of the citizen, cannot be denied. That the legal rights of a person depend upon whether the tribunal called upon to determine them is state or federal, is absurd. Relief will evidently not come from the Supreme Court; and if it does not come from the Supreme Court there is only one place from which it can come, and that is Congress. Section 34 of the Judiciary Act should be amended so as to read as follows:

"The *statutory or other* laws of the several states (*as construed or declared by the highest judicial tribunals of the respective states*) except where the constitution, treaties or statutes of the United States otherwise provide or require shall be regarded as rules of decision in trials at common law in courts of the United States in cases where they apply."

The italicized words are new and will, we think, very effectually prevent the "unconstitutional assumption of powers by the courts of the United States," of which Mr. Justice Holmes and some of his eminent contemporaries so bitterly complain.

Is not this a matter of sufficient importance to the country as a whole, as well as to members of the Bar, to warrant the American Bar Association in making a determined effort to have Congress pass the amendment above proposed or some other that will accomplish the same result?

THE DOCTRINE OF THE AIRSPACE ZONE OF EFFECTIVE POSSESSION

Brief Restatement of the History and Development of the Law of Airspace—Resumé of Recent Decisions to Determine Practical Application Which Has Been Given by Courts to Ancient Maxim "Cujus Est Solum etc."—A Constitutional Question for Serious Consideration—Conclusions Stated—Possible Future Expansion of the Zone of Effective Possession, etc.

By John A. Eubank
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THE questions of rights in airspace, whether or not surface owners own the airspace above the surface upward to an indefinite extent and the right of aircraft to pass in flight through the airspace over private subjacent property have for the past ten years or so engaged the attention and study of students of jurisprudence. Considerable has been written about these questions and the two opposing viewpoints in connection therewith have created interesting and earnest incentives for historical research and analysis of the various phases of the questions involved.[1] Heretofore or at least up until recent years most if not all of the legal precedents concerned airspace questions wherein the practical problems of aerial navigation did not enter. Such precedents concerned fixed structures or objects adjacent to the surface. In the past few years, however, court decisions have clarified the problems arising in connection with airspace rights. The result is that the law has not only been somewhat clarified, but the various phases of the law of airspace have been crystallized to some extent. From the research, analysis and study made of the problems of air law, together with the published articles thereon and the more recent court decisions, there has developed with reference to airspace and the subjacent owners' rights therein, a doctrine of the zone of effective possession.[2] This doctrine appears to be well established. Three recent court decisions in particular have thrown some very interesting light on various questions arising with reference to rights in airspace. Because of these decisions and the recent clarification of the law, a brief restatement of the history and development of the law of airspace is herewith attempted. Following this, a resumé of the recent decisions and the conclusions to be drawn as to the present state of the law shall be further attempted.

In his Institutes, Justinian states that the air like the sea is by natural right common to all. And in the latter part of the sixteenth century Queen Elizabeth said, "The use of the sea and the air is common to all." Justinian and the great Queen, of course, had no prophetic vision of the future of aerial navigation by modern aircraft, yet their statements were the basis, to some extent at least, of the so-called doctrine of "freedom of the air" which was strongly advocated in the first years of the present century. It was from about the year 1902 that the history of air transportation really began. True, balloons were used by Count Zeppelin in our Civil War and also in the Franco-Prussian War, but the powered aircraft did not come until Orville Wright's epochal flight in 1903. From 1902 up to the time of the outbreak of the World War there were two schools of thought. One favored the doctrine of "freedom of the air" while the other advocated the principle of "sovereignty in airspace." Fauchille, the French writer and lawyer, and a German writer, Dr. F. Meili, favored the former doctrine while English authorities opposed it. The latter contended very strongly that the presence of any vehicle overhead was always a source of danger to the lands and waters beneath. The British authorities thus realized that Justinian's and Queen Elizabeth's pronouncements of "freedom of the air" had not withstood the acid test of practical application. Here was evidenced the first indication of the breaking down of the doctrine of "freedom of the air."

The practical problems of the World War sounded the death knell to the doctrine that the air is free as is the sea, for soon thereafter the doctrine of air sovereignty gained the preponderance of the weight of expert authority. The World War proved that in time of crises national governments assert their soverignty in the airspace over their territory. At the first international convention held after the war the doctrine of air sovereignty was definitely settled. This was the International Air Navigation Convention held in Europe in October, 1919, and it adopted the provision that the contracting States recognize that every State has complete and exclusive sovereignty in the airspace above its territory and territorial waters. The Madrid Convention of 1926 and the Havana Convention of 1928 also adopted the same principle. The United States Senate ratified the Havana Convention on February 20, 1931., There were twenty-one signatories to this Convention, but by no means have all of them ratified it. The Paris Convention of 1919 also adopted a provision which accorded the right of innocent passage by subjects of one sovereignty over the lands of another but such right is merely a temporary and contractional one which can be revoked when occasions require its nullification. Thus came about a complete abandonment of the principle of "freedom of the air." Here is seen a tightening and restricting of the use of airspace. It is now well settled that the sovereignty in airspace is in the country whose lands and waters are beneath. In the United States, the sovereignty in airspace is in each state, subject to the disputed federal jurisdiction over interstate aerial navigation.

Many of the States of the Union have by specific legislative enactments declared their sovereignty in the airspace over the lands and waters within their re-

1. "Who Owns the Airspace?" John A. Eubank, American Law Review, Feb., 1929.
2. "What About the Airspace?" John A. Eubank, Canadian Bar Review, Feb., 1930.

spective jurisdictional boundaries. These states have expressed themselves by stating that the sovereignty in the space above the lands and waters of the State is declared to rest in the States, pursuant to a constitutional grant by the people of the State. Some of these states have omitted the exception. Some of these same states in adopting the Uniform State Law for Aeronautics have declared that the ownership of space above the lands and waters of the State is declared to be vested in the several owners of the surface beneath, subject to the right of flight. One state has gone further and has eliminated the clause "subject to the right of flight." Of course the Air Commerce Act of 1926 provides that the airspace above the minimum safe altitude of flight prescribed by the Secretary of Commerce shall be subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of the Act. Thus it is found that because of our dual organization of government the sovereignty in airspace is divided among the several states, subject to the possible qualification of control over interstate commercial traffic by the federal government. On account of this division of power between the federal government and the states problems in jurisprudence have arisen.[3]

By the term airspace is meant all that region above the earth's surface. The word airspace should not be confused with the term air. One is the fixed space and the other is the ether, gases or vapors contained therein. Very often the terms airspace and air are used synonymously even by some legal authorities.

Cujus Est Solum, Ejus Est Usque Ad Coelum Et Ad Inferos

The extent to which one's proprietorship in property extends upward, and downward also, is expressed in the ancient maxim *cujus est solum ejus est usque ad coelum et ad inferos*. Translated, the maxim means that he who owns the soil also owns everything from the center of the earth to zenith. The principle laid down finds its inception in the Roman Law. Napoleon in formulating his famous code of laws incorporated the maxim therein. Likewise it is found in modern civil codes, viz., that of Germany, Austria, Spain, Portugal, Italy, Holland, Uruguay, Argentine, Mexico, Japan and Switzerland. The provision in the German Code limits the executive right to the superincumbent airspace and the extreme depth below the surface only to that part thereof for which the owner may ever have any practical use. The codes of the other nations mentioned also contain a similar limitation. This is an important limitation and should be borne in mind. Many of the states of the Union have adopted the maxim as part of their civil codes notably California, and the doctrine laid down in the maxim with some possible limitation is the common law of this country and is supported by court decisions.

Pollock states that it does not seem possible, on the principles of the common law, to assign any reason why an entry above the surface should not be a trespass. The Law Journal, London, April 27, 1929, states as follows:

"To the question, therefore, whether an action for aerial trespass will lie, no definite answer can be given. But, as Pollock observes, there seems no reason or principle why there should not be such a tresspass. The development of civil aviation may bring this aspect of trespass into prominence and lead to a clarification of the present obscurity."

3."Who Owns the Airspace?" John A. Eubank, Philippine Law Journal, Manila, Philippines, March 1930.

For support the proponents of the Latin maxim rely on the certain judicial decisions, the maxim itself, its incorporation in various judicial codes, its acceptance and adoption by expert legal authorities from Blackstone and Coke down to more modern and contemporary authorities. A United States Senator at one time introduced a bill in Congress which recognized the private landowner's right to forbid flight over his property with the right to collect damages in the event of the violation of such alleged right. The measure also provided for the right of injunction to prevent such flights. A former committee of the American Bar Association has stated that it confesses that the maxim cujus est solum, ejus et usque ad coelum does not in terms at least admit of the invasion of private right in time of peace for military purposes. Major Elza C. Johnson while Legal Adviser of the Air Service of the United States stated that the space above the earth is fixed and all that belongs to it is private property, to which the owner is entitled to unmolested enjoyment without added and unnecessary dangers. That is very strong support for the usque ad coelum theory.

Many arguments, ingenious and otherwise, have been advanced against the proposition that the superincumbent airspace is not free to aerial navigation. Opponents of the maxim contend that it is obsolete and has no modern application in the light of present inventions and that if aircraft are to be of any practical use, such ancient and obsolete maxims are to be disregarded. Also they contend that if the maxim is to have any application at all it must be literally construed. In other words the proprietorship in the overlying airspace insofar as the subjacent owners are concerned is to be limited to such airspace as is appurtenant to the land, or, stated in other words, the ownership of property extends only as far upward as the necessities and protection of it require. To that extent and that only it is claimed the maxim is to receive any application. It is further asserted that the mere passage of aircraft over one's lands and waters at such a height as not to interfere with the use thereof by the owners is not an actionable wrong. The argument has been advanced that in the South and West in years gone by no one ever objected to cattle roaming over one's land which was not inclosed, therefore an aircraft flying over one's property should be free from a claim of trespass. It is further stated that no one would complain about a baseball being thrown across one's land or of one's pigeons or other birds flying over another's property. This is probably true if the baseballs and pigeons were not too numerous. So the analogies run.

Some have objected that to strictly construe the maxim would be to impede the progress of science and that therefore strict application should not be extended to conditions which did not exist when the maxim was in the process of development. The ancient doctrine of minerals with reference to the ownership beneath the surface which limited such ownership is claimed by analogy to apply to the limitation of the ownership of the airspace by the subjacent owner. Likewise the modern doctrine of the ownership of a vein under another's land through ownership of its apex, in the law of mines, is sought to be applied to the superincumbent airspace. Under the ancient law of roads the element of passage or the right to proceed with one's journey was deemed a superior right over the right of adjacent ownership and consequently if a road was blocked, the traveler had a perfect right to pass over the property adjoining the road. The traveler had the

right to pass even if in doing so he had to walk over growing crops. This is presented as another example of the limitations to which the airspace ownership is subject. Another analogy is advanced in the private ownership in the bed of a stream. It is contended that the easement or right of the public to pass over the waters, the bed of which is the private property of another is identical with the right to pass in flight through the airspace over private property.

Another ancient law evoked is the one which required a property owner to keep his land clear of bushes for a distance of some two hundred feet on each side of a highway in order that no highwayman might be able to hide behind bushes bordering the road. This is claimed to be similar to the right to leave free for the passage of aircraft a certain border or part of the overlying airspace. The ancient law made the adjacent owner liable to any person robbed by reason of the highwaymen being afforded a hiding place due to the failure of the owner to keep clear the strip of land for the required distances. At the risk of being facetious it might be stated that no mention is now made by those offering the analogy that if the clouds are not swept away by the subjacent land owner he might be liable for any robbery committed by highwaymen navigating in the upper strata. Also it is pointed out that the decisions of the courts with the exception of the Pennsylvania and Minnesota decisions and recent ones heretofore mentioned have applied the Latin maxim to airspace only immediately adjacent to the soil and not to the upper airspace in which aircraft pass in flight. A former committee on aviation of the American Bar Association has called the usque ad coelum theory a prepossession and a bugaboo.

Simeon E. Baldwin, former Governor of Connecticut and a high legal authority on aeronautical as well as general law, stated that the owner of land has no legal right in the airspace above it except as far as its occupation by others would be of injury to his property. Two opposing Latin maxims have been offered to combat the usque ad coelum doctrine. One is *damnum absque injuria,* which means of course damage without injury. If one is passing in flight over the private property of another and causes no damage, then it is contended that even though the upper airspace might be conceded to be the property of the subjacent owner, he has no cause to complain because he suffered no damage resulting in injury. The other maxim is *de minimis non lex curat.* Translated, it means the law gives no reward or damages for insignificant things. It is urged that the mere passing in an airplane through the airspace at a considerable height is so inconsequential insofar as interfering with the subjacent owner's use and enjoyment of the land beneath that no court would be bothered with any trivial action for damages or trespasses.

Some opponents of the maxim who attack it on the ground that it is ancient and obsolete, in their contention that the air is free, themselves evoke other ancient and obsolete maxims. In one statement they say that an owner of land has no proprietorship in the superincumbent airspace and in the next statement they admit indirectly that he has such ownership by advancing such doctrines as the ancient law of roads, ownership of minerals, the public easement of the use of navigable waters and others as well as legal maxims which have been mentioned previously. Through their indirect admissions by their application of analogies they admit proprietorship by the land owners in the superincumbent airspace, but in fairness it should be observed that such indirectly admitted ownership is restricted and limited.

Court Decisions

A brief review of some of the judicial decisions to determine what practical application has been given to the doctrine set forth in the maxim *cujus est solum ejus est usque ad coelum et ad inferos,* should prove illuminating. In a Georgia case it was stated that the owner of realty having title downwards and upwards indefinitely, an unlawful interference with his rights, below or above the surface, alike gave him a right of action. An Iowa court decided that the placing of one's arm over into the space above the land of another was a trespass for which one was liable. This court stated that it is one of the oldest rules of property known to the law that the title of the owner of the soil extends not only downward to the center of the earth but upward *usque ad coelum.* It was stated by a foreign court that it would be reluctant to hold that a landowner had not the right to object to one putting anything over the owner's land at any height. Firing a shot across the lands of another was ruled an actionable wrong in Minnesota, federal and English courts. The stringing of telephone and telegraph wires was held to be a trespass by a New York court. In this case, the Court said that so far as the case before it was concerned, the plaintiff as the owner of the soil owned upward to an indefinite extent. In California it was decided that an owner of land had the right to cut off the limb of a tree which overhung his property, although the tree grew upon the land of another. In this connection a New York Court held that an action for trespass would lie against one whose trees hung over into the space of another's property. An English court has decided that an action would lie against one whose horse kicked into the space over the land of an adjoining owner.

Recent Court Decisions

Commonwealth vs. Nevin and Smith, Penn. Dist. and Co. Reports, Vol. 2, (1923).—In this case,[4] the defendants were charged under a criminal statute with a wilful entry upon land by reason of flying thereover at heights between fifty and three hundred fifty feet. The Court of Review held that such a flight was not "a wilful entry upon land," and the defendants were acquitted of the charge. The court stated in its decision as follows:

> "Clearly it cannot be said that the flight of an aeroplane over land was, at the time of the passage of the act, such a thing as was, and always had been, a trespass upon land. 'Wilfully to enter upon land,' as used in the act, indicates an encroachment on or interference with the owner's occupation of his soil; but is not synonymous with a flight through the air over it, which has yet, so far as we are aware, to be held an entry upon it, and a meaning of the term not heretofore attributed to it."

Johnson vs. Curtiss, Northwest Airplane Co., Second Judicial District Court of Ramsay County, Minnesota, 1923.—This was an action[5] to recover damages for landing an airplane on the plaintiff's property and to enjoin the defendants from operating any aircraft over plaintiff's premises regardless of the altitude of flight. Damages were awarded but an injunction was granted only to the extent of restraining the defendant from flying at lower altitudes than two thousand feet and from making exhibition flights over said premises, including trick flying or aerial acrobatics. In this case

4. Year 1923.
5. Year 1923.

the Court said that the upper airspace is a natural heritage common to all of the people, and its reasonable use ought not to be hampered by any ancient and artificial maxim of law as "Whose the soil is, his it is from the heavens to the depth of the earth," and that to apply the rule as contended for would render lawful air navigation impossible because if the plaintiff could prevent flights over his land, then every other land owner could do the same thing.

Neiswonger vs. Goodyear Tire & Rubber Co., U. S. District Court, Ohio, 1929, 35 F. (2d) 761.—This was an action for damages caused by the low flying of a dirigible balloon over plaintiff's land which resulted in so frightening plaintiff's horses that they ran away injuring him. The Court held that the plaintiff had an implied right to recover damages for injuries suffered by reason of the violation of the 500-foot altitude rule of the Air Traffic Rules of the United States Department of Commerce.

Smith et al vs. New England Aircraft Co., Inc., et al (1931) Mass. Adv. Sheets 639, 170 N. E. 385.—In this action the plaintiffs sought to enjoin the defendants from flying over his property in such a manner as to constitute a trespass and a nuisance—which property consisted of a country estate adjoining defendant's airport. The plaintiffs also sought to enjoin the use of the field as an airport adjacent to their property. It appears that in take-offs and landings, the defendants flew as low as 100 feet over a wooded portion of plaintiff's property. At that time, the Massachusetts law prohibited aircraft to be operated over any thickly settled or business district at an altitude less than three thousand feet or over any building or person at an altitude less than 500 feet, except when necessary for the purpose of taking off or landing.

The Court held that while the isolated instances of flights at as low as 100 or 200 feet and the possibility of similar flights did not warrant injunctive relief, yet they did constitute a trespass to plaintiff's land and it is immaterial that such flights took place in the course of taking off or landing at the airport and that no actual harm was done hereby to plaintiffs' woodland.

In the decision it was further stated that the private ownership of airspace extends to all reasonable heights above the underlying land, but statutes which are reasonable may regulate such right in the exercise of the police power of the state, and the United States may exercise such power also within the field of interstate commerce.

It was also decided that aircraft, however, in order to reach or leave an airport, may not of right fly so low as 100 feet against the protest of the landowner, since such interference creates a sense of infringement of property rights which cannot be minimized or effaced.

The Court further stated that for the purpose of the decision it assumed that private ownership of airspace extended to all reasonable heights above the underlying land. And it would be vain to treat property in airspace upon the same footing as property which can be seized, touched, occupied, handled, cultivated, built upon, and utilized in its every feature.

Sysak v. De Lisser Air Service Corp., et al N. Y. Supreme Ct., Nassau Co. Decided April 14, 1931.—In this action, the plaintiff sought damages by reason of defendant's airplane striking plaintiff's house. The plaintiff also joined in the cause of action and sought injunctive relief against the town of Hempstead and the County of Nassau on the theory that they invited the aircraft company to invade plaintiff's airspace above his property by permitting aircraft to use such airspace without first having same acquired through condemnation proceedings. In other words, the plaintiff sought to invoke the *ad coleum doctrine*. The court held that the ancient common law principle that he who owns the surface owns upwards to an indefinite extent, must not be taken too literally and that in this age in view of developments of science, something must be left to statutory regulation and that consequently flight above minimum safe altitudes is authorized by law.

Swetland vs. Curtiss Airports Corp., et al U. S. Circuit Court of Appeals, 6 Dist., Ohio, December 30, 1931.—F. & R. Swetland as owners of a 135-acre tract with a residence thereon in the village of Richmond Heights, Ohio, had occupied the property as a residence sometime prior to 1929. In and about 1929 the Curtiss Corporation and its affiliates purchased a tract of some 272 acres which was opposite the Swetland property. Shortly thereafter on learning that an airport was to be constructed on the 272-acre tract, the Swetlands notified the Curtiss interest that the use of the tract as an airport would destroy their property for residential purposes. Notwithstanding this notice, plans were put into operation for the creation of an airport. Whereupon the Swetlands brought an action to enjoin the Curtiss companies from using the property for an airport. After hearing the case, the United States District Court for the Northern District of Ohio enjoined the airport people from permitting dust to fly or drift over the Swetland property in large quantities and from dropping circulars thereon from aircraft and from flying thereover at altitudes less than 500 feet. The district court however refused to enjoin the Curtiss interest from using the property as an airport, as a flying school for student aviators, from giving exhibitions and from flying over Swetland's property above the altitudes of 500 feet. Whereupon the Swetlands appealed the case to the United States Circuit Court of Appeals and asked full relief by enjoining the aircraft concerns from using the 272-acre tract as an airport in any manner whatsoever and from flying over their property at any height. The Swetlands contended that they owned the airspace above their property to an indefinite extent and that flight by aircraft even in the superincumbent airspace (upper stratum) without their consent was a trespass.[6]

The Court first considered the question of rights in airspace and in commenting upon the proposition whether or not he who owns the soil owns upwards to an indefinite extent, stated that such doctrine cannot be relied upon to define the rights of the new and rapidly growing industry of aviation and that this cannot be done consistently with the traditional policy of the court to adapt the law to the economic and social needs of the times. It further stated that from that point of view it cannot hold that in every case it is a trespass against the subjacent owner for an aircraft to fly over his property. But the court added that this does not mean that the owners of the surface have no right at all in the airspace above their land; that he, the owner of land has the dominant right of occupancy for purposes incident to his use and enjoyment[7] of the surface, and that there may be such a continuous and permanent use of the lower stratum (airspace) which he reason-

6. "Air Trespass Threatens Legal Obstacles to Aviation," John A. Eubank, Real Estate Magazine, Jan. 1929.
7. "What About the Air Space?" Canadian Bar Review, Feb. 1930, John A. Eubank.

ably expects to use or occupy himself as to impose a servitude upon his use and enjoyment of the surface. The Court went on to say in a somewhat halting and qualified phraseology that as to the upper stratum which the subjacent owner may not reasonably expect to occupy, he has no right, "it seems to us," except to prevent the use of it by others to the extent of unreasonable interference with his complete enjoyment of the surface. Nevertheless the court thus did infer that surface owners have a right even to the superincumbent airspace, when its use by others interferes with the full enjoyment of the subjacent land.[8]

The learned court declined to fix a definite height below which the surface owners might reasonably expect to occupy the airspace for themselves. The Court said, "That heights are to be determined upon the particular facts of each case." It further made the significant statement that the Air Commerce Act of 1926 regulating the minimum safe altitude of flight at 500 feet in rural sections did not determine the rights of surface owners,[9] either as to trespass or nuisance.

Continuing, the opinion stated that aircraft in flying over plaintiff's property both in taking off and landing would fly below 500 feet and thus would cause considerable annoyance to the plaintiffs and interfere with the enjoyment of their property.

"The defendants have the right to establish airports," wrote the court, "but they cannot lawfully establish one at a place where its normal operation will deprive plaintiffs of the use and enjoyment of their property." Continuing further, the opinion states "the plaintiffs have already suffered much annoyance and discomfort, and the evidence shows a property depreciation of about $65,000. Besides, there are other injuries which the plaintiffs will suffer. They have resided on this property for many years, in one case for a quarter of a century. They desire to continue to live there. If the defendants are permitted to use this property as they now contemplate, the plaintiffs will be put to the inconvenience of leaving their property and seeking other places to live. These inconveniences with the severance of their social relations in the community will result in injuries that cannot be measured in damages."

In conclusion the court held that the Aircraft companies, the defendants, are enjoined from operating the airport.

Mr. Justice Hickenlooper, a member of the court, concurred in the conclusion reached in the majority opinion of the court but declined to concur in that portion of the opinion which made a distinction between flights in the lower strata and in the superincumbent airspace, founded upon reasonable expectation of use. He also refused to join in that part of the opinion which held that a single flight over property may not constitute a trespass but such flights may be so continuous in the aggregate as to do so. Although Justice Hickenlooper stated that this highly technical question seemed to be unnecessary of decision in the case, such dissenting features of his opinion indicate that he would consider a single flight over private property sufficient to constitute a trespass thereof and the trespass would occur whether the flight was at high or low altitudes. In other words, it would appear that he believes that subjacent owners own the airspace up to an indefinite extent. Undoubtedly this case will go to the United States Supreme Court for final determination of the *ad coelum* theory.

8. "Who Owns the Airspace?" John A. Eubank, Current History, April 1929.

9. "Ownership of the Airspace." John A. Eubank, Dickinson Law Review, Jan. 1930; "What About the Airspace?" John A. Eubank, Canadian Bar Review, Feb. 1930; "Who Owns the Airspace?" John A. Eubank, American Law Review, Feb. 1929.

Constitutional Question

The provision of the Air Commerce Act that the airspace above the minimum safe altitude of flight prescribed by the Secretary of Commerce shall be subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of the Act, has not settled the question as to what extent the legal maxim *usque ad coelum*, etc., is to have legal application in the light of the development of modern air navigation. Through the alleged power of the Commerce Clause in the Federal Constitution, the aforementioned provisions of the Air Commerce Act do however attempt to assert the right of freedom of aerial navigation for interstate and foreign commerce purposes superior to the right of subjacent landowners to use the airspace to any extent or degree which may interfere or conflict with the use thereof by interstate and foreign air commerce.

The legality of this assertion of the right of freedom of aerial navigation for interstate and foreign commerce is not to go unchallenged. The theory, of course, is that Congress has the power under the Commerce Clause of the Federal Constitution to regulate all foreign and interstate commerce whether it be on the water, on the land, or in the airspace. Also the analogy has been advanced that the Supreme Court of the United States has regarded the right of the owner of shore or submerged land as being restricted to the superior right of the public in general, and, as the result, the United States may assert its right against individual owners of land in the interest of interstate and foreign air commercial navigation. In this connection the United States Supreme Court has decided that the right to improve navigation is paramount to the riparian owner's right of access to a stream, Consequently is evoked the Commerce Clause, that "cure all" for all doubtful legislative action. Congress's power to regulate interstate and foreign commerce through the medium of the Commerce Clause is subject to the limitation of other provisions of the Federal Constitution. Reference is made particularly to the Fifth Amendment, and which it will be recalled provides in part that no person shall be deprived of life, liberty or property without due process of law nor shall private property be taken for public use without compensation. Whether or not the provisions of the Air Commerce Act that the airspace over private property is free to interstate and foreign air navigation, is depriving one of his property without due process of law and is an unwarranted exercise of federal power, is a question for very serious consideration.

In this connection it was stated by the court in Smith vs. New England Aircraft Company that the issuance of regulations by the Secretary of Commerce may be authorized by Congress, and so far as not violative of constitutional rights such regulations have the force of law. In speaking of the state and federal statutes regulating air traffic, the decision stated:

"These statutes and regulations recognize the existence of navigation of the air as an established condition. They do not create such navigation. They do not authorize the taking of private rights to promote such navigation. The assumption underlies their terms

that navigation of the air exists and requires regulation in the interest of the public welfare."

Zone of Effective Possession

A careful analysis of the contentions on both sides of the proposition will disclose the fact that ownership is admitted either directly or indirectly, but with the important distinction made by those opposed to the *usque ad coelum* theory that ownership is limited to those uses which are appurtenant to the land and to the full enjoyment thereof. In other words ownership is limited to the zone of effective possession. This it will be recalled is the position taken by those states that have adopted the Uniform State Law for Aeronautics.

Likewise this stand is in accord with the civil code of the various nations previously noted. In other words private owners own the airspace above their property subject to the right of flight and the non-interference with any use they may choose to make of their property. Of course this limitation is a significant one. No one can foretell or possesses a vision so keen that he can prophesy in the least what new scientific inventions may be in use within the next quarter of a century or less, the employment of which in connection with one's land may conflict in no small degree with the theory of the right of flight. It is for this very reason that fundamental property rights should not be too readily cast aside. That which may be denied to subjacent owners today may be an urgent necessity to them and the world in general tomorrow. Even with reference to modern structures, a short time ago the president of one of the foremost engineering and construction concerns stated that two hundred-story buildings offered no structural engineering impossibilities and that engineers welcomed an opportunity to design such structures. While the zone of effective possession of the upper air strata may today be but five hundred to one thousand feet, with two hundred-story structures such zone will embrace the airspace up to twenty-five hundred feet. With the passage of time and new developments the ultimate zone of effective possession may reach to five thousand or even ten thousand feet. No one can actually predict the future and attempt to place any limitation with respect to future physical possibilities.

The conclusion is that the surface owners own the airspace above their property up to a height of the zone of effective possession, in other words within the zone of expected use. But it should be borne in mind that the zone of effective possession may be increased to an indefinite height and at the will of the surface owner, once the latter makes use thereof in connection with his surface area. And that no fixed or unvarying height can be stated because the height is to be determined upon the particular facts of each case. In some cases the zone of effective possession may only be 500 feet and in others where tall structures have been erected such zones may be 1,500 feet. As time goes on and new inventions and science are further developed to such an extent that further uses of the upper strata are to be made, the zone of effective possession may reach up to thousands of feet or to that region known as the superincumbent airspace. It is conceivable in the light of the present day development of aviation that one may wish to possess a tract of land over which it is desired to make experimental flights up to 20,000 or more feet, and where it may be both desirable and necessary, in order to have the full enjoyment of the subjacent area, to have also the exclusive use of the upper air strata. Under such circumstances the airspace appurtenant to such subjacent land and of the zone of effective possession would be up to 20,000 feet. Only recently one of the architects in the Radio City development in New York City stated that buildings 7,000 feet high were possible. Such a height is almost six times that of the Empire State Building, the world's tallest structure. So that if courts rightly adhere to the zone of effective possession principle, as time goes on and science further develops and advances, jurisprudence may in spite of itself more closely approximate the *ad coelum* or "to the sky" theory.

Washington Letter

1266 National Press Bldg.,
Washington, D. C., Nov. 11.

Jurisdiction of Interstate Commerce Commission Over Broadcasting Rates

ON October 4, 1932, the Interstate Commerce Commission dismissed the complaint filed in the case of Sta-shine Products Company, Inc., v. Station WGBB of Freeport, N. Y., H. H. Carman, Proprietor, et al., and held the broadcasting rates, charges, rules, regulations and practices of the National Broadcasting Company, Inc., and Station WGBB were not within the provisions of the Interstate Commerce Act, and therefore not subject to the Commission's jurisdiction.

The complaint, which was the first of its kind filed, had alleged that the broadcasting rates, charges, rules, regulations, and practices were unreasonable and unjustly discriminatory in violation of Sections 1 and 3 of the Interstate Commerce Act. The defendants denied that they were common carriers. After quoting from the Interstate Commerce Act, as well as the Radio Act of 1927 and other legislation, the Commission said in a majority opinion written by Commissioner Tate:

"The provisions of the Act are undoubtedly applicable to the transmission of wireless messages by persons or concerns engaged in the transmission of such messages as common carriers for hire, that is, common carriers holding themselves out to transmit for the public at large and deliver such messages to a designated receiver. But can it be construed as applying to persons or concerns engaged merely in the business of broadcasting as performed by defendants here? We are of the opinion that it can not be so construed.

"In so far as our jurisdiction is concerned the provisions of section 14 of the radio act of 1927 can apply only to the common carriers specified in section 1 (3) of the act. Therefore, in determining whether the defendants are subject to our jurisdiction, the decisive question is whether they are included among the specified public utilities to which the provisions of the act now apply. Companies engaged in radio broadcasting are not specifically named therein. In fact, at the time of the passage of the transportation act, radio broadcasting, as now perfected, was unknown. Therefore, it is obvious that if defendants are within those specified therein, it is because they are telephone companies operating by wireless and engaged in transmission as defined in section 1(3) of the act. While the method used in broadcasting is technically radio telephony, nevertheless, a company engaged in broadcasting falls short of performing the service of a telephone company operating by wireless. Defendants do not provide telephone facilities or service for the public. No one could go to any office or booth maintained by them and make a telephone call. They do not, and under their licenses may not, provide the services which telephone companies perform. Defendants sell 'time' to the public, the program is put on the air, and then the broadcaster, having performed his contract, is finished. No service is performed at the receiving end by the broadcasting company, similar to the service performed by common carriers in the general transmission of messages.

In passing the act, Congress made its provisions broad enough to cover telephone and telegraph companies operating by wire or wireless and transmitting messages, communications or other intelligence by radio apparatus, but did not include broadcasting companies or radio broadcasting as now conducted, the formation of which was a later development." . . .

"We do not believe this new art and practice, unknown at the time of the passage of the transportation act, of simply putting on the air or ether this instruction, entertainment, or advertisement, to that part of the public who may, by their receiving sets and antennae, go out to get this matter, was ever meant by Congress to be included in any act conferring express or implied power upon this commission. It cannot be presumed that the Congress was attempting to regulate a mere potential service, one that might or might not be developed, and particularly a service distinct and different in character from the methods of transmission of intelligence then known, i. e., messages by wireless from a definite sender to a definite receiver. This conclusion is supported by section 1 (5) of the act wherein transmission of intelligence as a message or communication by wire or wireless is divided into day, night, and the other classes of messages."

Commissioner Aitchison, concurring in the decision, held that the complaint must be dismissed as neither the particular person made defendant nor the service in question was within the terms of the act.

Chairman Porter, in a dissenting opinion, in which Commissioner McManamy concurred, held that the sounder basis upon which to place the dismissal of the complaint was that in the particular service in question, the broadcasting company was not rendering a common carrier service but one which it performs as a private utility. According to Mr. Porter's opinion,

"It is wholly immaterial whether or not the present existing mode of broadcasting in all of its details existed at the time of the passage of the law, provided the statute by its terms, as it clearly does, covers all common carriers, engaged in the transmission of intelligence by wireless. Our jurisdiction attaches to all persons engaged in that occupation wholly irrespective of the fact as to whether the mode of operation was known to Congress at the time of the enactment of the statute or not."

He disagreed with the majority in their position, which he stated "completely ignores the legislative construction placed upon the power of this Commission by Congress itself. In the Radio Act of 1927, section 14, there is clearly recognized the authority of this Commission over the matters of radio rates and facilities."

Claims Against the U. S. in the Court of Claims

The total amount of judgments rendered against the Government during the last fiscal year was $5,503,534 in cases in which recovery was sought in the aggregate amount of $470,513,986. The percentage of recovery was approximately one per cent of the amount claimed. This disposed of 823 cases, or the largest number of cases finally disposed of in the Court of Claims during recent years. The total amount of the judgments entered in favor of the Government during the year on counterclaims was $1,591,691. Heretofore judgments in tax and some other claims have carried interest at the rate of six per cent. The Economy Act of 1932 reduced the rate of interest to four per cent.

Appalachian Coals, Inc.

An appeal was filed November 10th with the Supreme Court of the United States by Appalachian Coals, Inc., and 137 producers of coal in the so-called Appalachian region from the recent decision of the three-judge Federal court holding that the regional sales agency plan of the appellants for marketing bituminous coal is violative of the Sherman Anti-trust law.

Causes of Commercial Bankruptcies

The Department of Commerce has just issued Domestic Commerce Series No. 69, entitled Causes of Commercial Bankruptcies. This is a study made in cooperation with the Institute of Human Relations and the Law School of Yale University. The pamphlet is for sale by the Superintendent of Documents, Washington, D. C., for 10c per copy. The report consists primarily of a critical analysis of the causes of bankruptcy and the information presented was secured from a detailed analysis of 570 commercial bankruptcies.

The major causes of bankruptcy disclosed by the data analyzed in this study are inefficient management, unwise use and extension of credit, adverse domestic and personal factors, and dishonesty and fraud.

The following suggested remedies, according to the report, if applied, will undoubtedly result in a reduction of commercial failures and attendant losses:

(1) Prevention of unjustifiable entrance into business, by extending credit only to individuals whose ability, training, experience, and other necessary requisites have been definitely determined and proved, to insure qualified and competent management of an enterprise whose existence is economically justified.

(2) Discouragement of the use of bankruptcy as a method of discharging debts by amending and utilizing the existing bankruptcy law to assure (a) a thorough examination of every bankrupt case, (b) conviction of fraudulent debtors and refusal of discharge to the undeserving, and (c) creditors' control of bankrupt estates vested in an agency that will actively and effectively function.

The statement commonly and carelessly made in recent years that failures are accounted for by the "business depression" is in a large measure incorrect. During the years 1927 and 1928, a period of boom prosperity in the opinion of many, approximately 47,000 concerns failed with a loss to creditors. During 1929 and 1930, a period in which the characteristics of a depression were in evidence, slightly over 49,000 failures occurred. The large number of failures occurring prior to 1929 must be attributed to something other than "business depression."

Decisions of the Supreme Court of the United States

The United States Daily, published in Washington, D. C., has added a new feature to its service which is of particular interest to lawyers. It is the new Supreme Court Decision Service by which it is planned to bring to subscribers of the United States Daily the complete text of all decisions of the Supreme Court the day after they are handed down. No. 1 of the Supplement service appeared November 8, 1932, and contained the complete text of opinions announced at the Session of the Court of November 7, 1932.

CONFERENCE OF BAR ASSOCIATION DELEGATES MEETING IN WASHINGTON

AT the seventeenth annual meeting of the Conference of Bar Association Delegates, held in Washington on Monday, October 10, 1932, emphasis was placed upon the matter of bar co-ordination. Interest in this subject, after being dormant for several years, flared up when Chairman James Grafton Rogers made it the subject of his address to the Conference at the Memphis meeting in 1929. The result was the creation of committees both by the Conference and by the American Bar Association, and subsequent activities leading this year to the amendment of the Association's constitution and by-laws.[1] The Conference had made this topic the first on its program for the two intervening annual meetings.

Reference will be made later to the forenoon session, devoted to committee reports and to a most remarkable address by Mr. Stuart H. Perry on Judicial Selection in Its Relation to the Press, the Legal Profession and the Co-ordinated Bar.

Chairman Wickser deferred his address until the beginning of the afternoon session so it could more effectively introduce the discussion of the co-ordination movement. The address reviewed more than fifty years of the Association's history in respect to its attitude toward other professional organizations. Originally the intention of the Association's founder, Judge Simeon Baldwin, was to create a delegate body, and the proposal was not abandoned for a long time. It apparently failed because of the impossibility of utilizing the scattered and heterogeneous units of the bar throughout the country as a base. From 1890 until 1907 the records disclose no aspirations toward a co-ordinated bar. Mr. Wickser attributes this to the fact that "No one arose, during all those years, to make clear the limitations inherent in the problem of launching and operating a nation-wide bar association, or to describe in terms of practicability its objectives." And the proposals and plans of later years ". . . failed because they did not square with the requirements and limitations of some hundred odd thousands of lawyers, scattered in all parts of a broad nation, and differing as to condition, outlook and opportunity, in every conceivable fashion, as well as did the plan, however miniature in compass, upon which the Association was actually operating."

In 1913 Dean John H. Wigmore was made chairman of a committee on reorganization of the Association and the proceedings of the 1916 meeting told of the defeat of recommendations intended to promote bar co-ordination. In that year there was also need for a delegate conference to promote co-operation between the Association and all state associations of the bar in respect to uniform canons of ethics. From these sources came the first meeting of bar delegates, fathered by President Elihu Root and fostered by Judge Simeon Baldwin, Mr. Moorfield Storey, Julius Henry Cohen and Charles A. Boston. In 1919 the Conference of Delegates was made a section in the revised constitution. It has since functioned as a co-ordinating link between the one national body and the numerous state, district and local associations, numbering in all about 1250 at this time. It has also been the forum in which proposals for bar co-ordination have had their first hearing.

Chairman Wickser presented a very full account of the several unsuccessful efforts to further organic relations between the central and the provincial associations, in all of which the Conference of Delegates has taken some part. In conclusion he submitted his opinion of present needs, formulated during three years of service on the committee created by the Executive Committee and headed by Mr. Jefferson Chandler, as follows:

Steps Toward Co-ordination

"The struggle to achieve representative government in the American Bar Association, which has continued since its foundation, demonstrates two propositions. An association organized solely upon a membership basis, divorced from contacts with other associations, and from the vast majority of the bar, is not satisfactory. Everyone admits that competition with other associations for the allegiance and the dollar of the individual lawyer is ruinous to all concerned, and that inherent limitations in the general assembly form prevent its indefinite expansion, and render it neither truly deliberative nor representative. Our present organization, therefore, has subsisted in spite of its weaknesses and in default of something better. On the other hand, it is clear that schemes for federation to be acceptable must be practical. They must not, as matters stand today, surrender even partial control of the Association to those who are not members of it, and they must guarantee active participation by those who are to cooperate under them. Schemes for federation, fought over in the past, have been too subjective. They have been too logically perfect—dependent upon what people ought to do, rather than what they probably will do. The beguiling aspect of their very perfection has frustrated a good deal of sincere effort.

"True progress, therefore, would seem to lie in developing some structure not earth-bound by the limitations of our present organization, yet which does not seek to attain complete federal organization at one leap. Realistic regard for conditions as they exist today will indicate that such a theory is not primarily a compromise, but promises the most efficient discharge of the tasks which lie before the whole profession. The bar has always been confronted with problems which affect every member of it. Today, it is confronted with especially serious problems which are not peculiar to the members of the American Bar Association and which can not be solved by them alone. Their solution requires that the whole profession, after investigation and discussion, unite upon a position in respect of them. To cite illustrations: the public is unable to discover how the bar, as a whole, proposes to cut down delay and expense in the administration of justice; how it proposes to curb and discipline its unscrupulous members whose numbers increase as it becomes overcrowded; and what reason the profession proposes to offer why the workmen's compensation act should not be extended to cover accident litigation. The American Bar Association has not the capacity to answer these questions for the whole profession, and will never have that capacity while organized as it is organized today. It is, however, more important for the American Bar Association to try to find some way for the whole profession to consider such questions, and to take a position publicly in respect of them, than it is to determine how state and local associations would

1. The amendments were adopted at the conclusion of the first session, Wednesday forenoon, Oct. 12. They constitute the fruits of three years of consideration of the problems of bringing about community of interest among the many independent bar associations. The new articles of the constitution and by-laws are explained on pages 706 and 707 of the November issue of the Journal. The last paragraph of article four provides for assistant secretaries and "one or more junior executives," thus enabling the Association to send its emissaries directly to the officers of state associations in furtherance of co-operation along lines to be determined.

vote in the election of its governing bodies, if such associations were federated with it.

"This the American Bar Association can do. It can create machinery to confer with state associations, and to develop with them definite topics for consideration by their members, and, under their leadership, by the local associations within their territory. This will require the American Bar Association to systematically obtain reliable information and data bearing on the interests, organization, and characteristics of the bar in every part of the country. It will require a staff of full time competent junior officers, whose duty will be to effect personal contacts with the administrative and executive officers of state associations, and for this purpose to travel throughout the year. Lastly, it will require that the Association have a definite program in the form of concrete suggestions and inquiries, prepared each fall, at the direction of its governing bodies, in order that there may be tangible bases for discussion. Such a program does not minimize the social aspects of our annual meetings, nor does it unbalance our constitutional structure. It emphasizes something which has already happened: that the Association has, in fact, become a vast business organization. Its business is to sell ideas to, and provoke reaction by, 160,000 lawyers. To accomplish this, it should be organized as other successful businesses have been organized, with an eye single to the work to be done. In precise terms, that work is to ascertain the sentiment of the bar of the whole country on those questions which most nearly affect its position of leadership and its economic status. The state associations are fully aware of the truth of these basic propositions. They unquestionably will cooperate with the American Bar Association in the development of any definite program, but it is the American Bar Association alone which, as matters yet stand, can bring order out of chaos.

"The Conference of Bar Association Delegates can be of great assistance. It already has entree with the active and influential associations throughout the country. To their leaders, it is already a reality, and the theory and objectives for which it stands have long had their approval. State associations have never been asked whether they would be willing to tie in their administrative machinery with that of the American Bar Association, nor whether they would be willing to consult each year as to a definite program for the whole bar, and as to ways and means for bringing such program to the attention of the profession in their states. Except for the Conference, the Association has no machinery for proposing any such unity of effort to the state associations. But the Conference can, within a year, gather the opinion of the State Associations as to what, in view of their particular situations, would be the best machinery to enable them to cooperate. The resulting data is indispensable to real prograss in coordination of the bar. It should be obtained in order that fact may replace conjecture. Its assembly will unquestionably prove to be the greatest single contribution toward the solution of the problem of representative government in the American Bar Association, and the achievement of its manifest destiny."

Self-Governing Bars Are Co-ordinated

Mr. Charles A. Beardsley, a member of the General Council, and lately president of the self-governing State Bar of California, was called upon to speak of bar co-ordination from the point of view of an inclusive, statutory state bar. He first referred to the lack of unity of interests among the associations, and quoted Horace Mann as saying "I have never heard anything about the resolutions of the Apostles, but a great deal about their Acts." The speaker added: "We hear about the resolutions of these unco-ordinated bar organizations. We hear little about their actions."

There are ten all-inclusive statutory state bars, Mr. Beardsley pointed out, and it is a simple matter to report their attitude toward co-ordination. They became co-ordinated as the result of strenuous effort and they exist as living proof of the effectiveness of co-ordination. Fifteen or more states appear now to be following their example, and it was the speaker's opinion that there could be no complete and organic unification of the profession until in every state the state bar had acquired co-ordination.

Meanwhile, however, efforts to bring about united action between the American Bar Association and the smaller units of organization is in order. Mr. Beardsley made a powerful argument for the proposal once or twice rejected in past years, of having members of the General Council elected in the several states, instead of by a very small number of members who attend the huddles each year after the Wednesday forenoon session. The election of members of the General Council might be used to create interest where it does not exist, instead of merely rewarding those who already are interested. When California members present at the caucus would choose the state's member of the General Council, it would be action by one percent of the 1700 members of the American Bar Association living in California. Nothing could be less representative than this. Those who travel to attend a meeting need no reward for their interest.

By contrast he suggested the selection of this General Council member by the fifteen members of the Board of Governors of the State Bar of California, every one of whom is a member of the American Bar Association. That would interest many lawyers unable to attend annual meetings and would demonstrate the actual use of the principle of representation.

Speaking of the obstacles met in co-ordinating the several integrated state bars Mr. Beardsley said:

"The principal obstacle has been the habitual conservatism of the Bar. Douglas Jerrold had the members of the legal profession in mind when he described a conservative as a man who refused to look at the new moon out of respect for that ancient institution, the old moon. Co-ordination of the Bar in the states is being brought about by men who are willing to look at the new moon. . . . We will get co-ordination of the Bar nationally just as we got it in ten states, and are getting it in fifteen or twenty more, through the efforts of lawyers who are willing to look at the new moon, who are willing to figure out some way to bring about a 'common action, movement and condition of the Bar' to use Webster's definition of the word 'co-ordination.'"

Bar Unity Appeals for Workers

Mr. Earl Evans, chairman of the General Council, made a stirring appeal for progress toward co-ordination, "not so it would make life more tolerable for us, but in order that the law may better function for the protection of the citizen."

"I haven't found anybody who does not want the Bar of the United States co-ordinated. It seems to be near and dear to the hearts of every member of our profession, but there are few who feel that they should do anything about it. If we could devise some way of securing complete co-ordination of the bar of the United States by means of hypodermic injections, practically every lawyer in the country would bare his arm for the ordeal.

After referring to the predicament the Bar finds itself in with respect to discipline and lay encroachments, by reason of failure in the past to achieve power through co-ordination, Chairman Evans concluded as follows:

"There is only one way that I know of by which we can secure the sort of co-ordination that is going to make itself felt and so do the job that each of you is thinking of now, and that is for you, and you, and every mother's son of you to resolve that from this time on I am not going to trust Phil Wickser or Jeff Chandler. I am going to get interested in it myself. I could absolutely agree to bring about co-ordination within five years' time if I could be assured that half of you

here would say it, and mean it, and do it; and if you don't mean that, if you won't do that—forget it."

Resolution Requests Early Action

The policy suggested by Chairman Wickser, of bringing about co-operative work between the American Bar Association and state bodies without waiting for organic union, was supported by the next speaker, Mr. Robert H. Jackson, chairman of the Conference' committee on this subject. He said that responses from state and local associations, whose officers were asked to submit suggestions, were too few to afford encouragement.

"Our committee has reached the conclusion that these different associations should run around together a little bit before they talk of getting married. If we work together for a time, the rest will probably come about, or else we will find it undesirable or unnecessary. The Bar of the country should at this time unite, not necessarily in voting, not necessarily in machinery, but unite in meeting some of the great problems which face us."

He suggested then concerted action to improve conditions in the fields of judicial selection, the economic condition of the bar and lay encroachments. Realizing the need for giving consideration to widely varying opinion, Chairman Jackson offered the following resolution:

RESOLVED, That this Conference of Bar Association Delegates, representing State and Local Bar Associations, declares its belief that the Bar Associations of the Country would welcome and invite an assumption by the American Bar Association of an aggressive leadership toward uniting and guiding Bar efforts to solve the problems facing the legal profession;

BE IT FURTHER RESOLVED, That the proper officers and committees of this Conference be directed to prepare and submit to the Executive Committee of the American Bar Association a memorial asking the adoption of a plan of co-operation with state and local associations, so as to avoid the present diffusion of Bar energy and duplication of effort and to present a united program of solving some definite Bar problem.

Views Regarding General Council Selection

Judge James F. Ailshie gave strong support to Mr. Beardsley's endorsement of the inclusive state bar, which has been very successful in his state, Idaho. The problem of discipline has been solved and the State Bar has a strong grip on admissions. Recently there were fourteen applicants for the privilege of taking the bar examination. Only six of these were found qualified to make the attempt, and the probability was that four would be passed.

"I heartily recommend our system to any state bar that wishes to have a more strict control over all practitioners."

But the speaker disagreed wholly with Mr. Beardsley in respect to the mode of choosing members of the General Council. He believed that such members should be chosen only by those who attend an annual meeting, as has always been the case. He told how efforts to change this had failed and warned the Conference against reopening the controversy in view of prevailing opinion.

Mr. Louis A. Lecher, of Milwaukee, agreed as to this matter. He held that a General Council made up of men not familiar by close contacts with the Association would not be able to nominate the right men for the Executive Committee, and that great harm might result.

Mr. Franklin A. Velde, of Illinois, explained that in his state association officers are elected on a ballot sent through the mails, and the plan had been adopted of enclosng also, in envelops addressed to American Bar Association members, a special slip containing the names of candidates for election to the General Council. A petition signed by twenty members is required to place a name on this ballot. In this way it is easy for American Bar Association members in Illinois to make an intelligent choice of their representative and avoid all the objections inherent in the annual huddle, or caucus.

At this point Chairman Wickser said that the Conference had not been asked to deal with the matter of choosing members of the General Council, so the discussion was irrelevant.

Proposal to Raise Money

Mr. John L. Darrouzet, president of the Galveston Bar Association, moved adoption of the following amendment to the pending resolution:

"For defraying the expenses of the committee in bringing about proper co-ordination of the Bar, each state bar association shall be requested to pay the sum of $100.00 and local associations $50 per year, until full co-ordination shall be a fact instead of a dream."

In a most entertaining defense of the amendment its author said that a demand for contributions would interest the local and state associations more than anything else, and after making a payment members would come to the annual meetings "Because they will want to know what you have done with that $50."

Without prejudice to the amendment, Mr. Jackson, the mover, put the matter up to a vote, saying:

"I am glad to hear one man who is willing to back his resolutions with cash. Until the Bar is ready to back its resolutions with cash enough to get them carried there is not much use of adopting resolutions. At the present time we are not paying to our associations as much dues as for a third-class secret society. We must eventually back this thing up with proper financial support."

The amendment lacked four votes of passing, a division having been taken.

On the principal question Mr. Frederick B. Adams, Utica, N. Y., told of the wonderful work recently performed in creating district federations of local associations. But in spite of the success of this movement there is still a great lack of unity and co-ordination in the state of New York, and less than one lawyer in five a member of the State Association. Until the last two or three years the life of the county associations has resided in the passing around of the honors of office, but now the idea of professional duty is coming to the fore.

State Meetings of Members Proposed

The Hon. Henry W. Toll, Denver, offered a practical suggestion as to stimulating interest among American Bar members who rarely or never attend conventions. At present their number greatly exceed those who attend and their contacts are far too limited. Senator Toll would have a meeting of American Bar Association members when their state bar association convention is held. There it would be possible to enlighten and energize the stay-at-homes. And with such group meetings a regular course it would be possible to solve the problem of choosing General Council members. The choice could be made in accordance with the representative principle, and if the person selected failed to attend the annual

convention, then his place could be filled by caucus, as under the existing arrangement.

Would Effect De Facto Co-ordination

Mr. Caleb C. Brown, of Syracuse, N. Y., presented a plan for increasing the number of American Bar Association members and at the same time co-ordinating the national, state and local associations by unitary membership, on a voluntary basis. He said that he had found that the one successful way to induce worthy lawyers who have not joined bar associations to sign up was by explaining to them that there is now a great national movement for the co-ordination of the bar, a movement destined to achieve great results, and that they should forget their dissatisfaction with bar associations as they are, and join in a movement to make them a genuine force in state and national affairs.

"It seems to me that if the American Bar Association were to say to the various state bar associations that it would grant membership to lawyers applying through their local associations, providing the state association did the same thing, we would then have a plan so that the officials of the 1200 local associations of the country would have something to sell to the Bar at large. They would be able to go to them with the comprehensive plan of joining the local, the state, and the American Bar Association at one time. . . It has a sales appeal. You can go to these lawyers who should be carrying their share of the work, and show them how to become a part of the nation-wide bar organization movement. . . In many localities a tremendous gain in membership could be made for all three classes of association."

All this could be undertaken without disturbing existing methods. It would afford immediate progress as opposed to waiting for an ideal solution. It would aid if some concessions as to dues were made by the associations. It would aid powerfully in getting more local bodies in the field. "If we reached a situation when most of the members of local bar associations were members also of their state association, and the national, probably complete co-ordination would be so simple that we would not have to pass through the years of trouble and tribulation which Chairman Wickser has told us about."

Profession Seeks Adequate Machinery

Before the resolution was put to a vote, and enthusiastically approved, Mr. Wickser explained the general policy in respect to co-ordination. The program is to operate on a businesslike basis, to create a force of executives who will keep in touch with state and local associations, and carry to them the American Bar Association ideals and proposals, and finally, to work out a plan. "The Bar should undertake to integrate itself in terms of service to the public. . . Our true goal is, without further delay, to *serve the profession throughout the country in terms of work.*"

"There are state and local associations also anxious to serve our profession. Our first duty is to get in touch with those units as rapidly as we can, find out about them, find out whether they are fakirs or whether they want to work. If they want to work—whether they hate us, or whether they want to work with us—get those points settled. Find out how they want to work with us. . . As a realistic proposition, sooner or later, we have got to get into a unified rythm with the state, the district and the local associations.

"The first thing is for the American Bar Association to determine what are worth-while subjects for lawyers to study and deal with. That done, state associations must be asked if they will unite in endeavor, and if they agree, must be permitted to take care of their local units. By accomplishing this you will put the Bar in rythm with itself. Basically the Bar wants to grapple with these problems. The average lawyer is greatly interested, but as an individual, he is helpless.

"It is just as Mr. Elihu Root said in 1916; the Bar is not exercising the influence it should and the reason is defective machinery. The Bar is exercising less influence than it was sixteen years ago, and the reason still is defective machinery.

"The resolution offered is appropriate for, while it is not the role of this Conference to dictate to any body, its true function is to stimulate action along idealistic lines, to make suggestions. The resolution states, in effect, that it is the sentiment of today's meeting that the Executive Committee should establish appropriate machinery to see what can be done to develop professional influence."

Notable Address on Judicial Selection

The forenoon session of the Conference was devoted mainly to consideration of the problems of judicial selection and tenure and such related factors as newspaper publicity and politics. The leading topic was introduced by the address of Mr. Stuart H. Perry entitled Judicial Selection in Its Relation to the Press, the Legal Profession and a Co-ordinated Bar. The speaker was a practicing lawyer before becoming a newspaper publisher; he is at present a member of the Judicial Council of the state of Michigan, his residence being at Adrian.

This address went into the subject of politics and the judiciary, the need for reform and the possibilities in sight in a manner more thorough and more penetrating than anything written on this subject in several decades. The delegates, profoundly impressed, adopted a resolution thanking the speaker and requesting the Executive Committee to publish the address widely. Within the limits of space available for this report it would be impossible to give any fair idea of the nature and forcefulness of Mr. Perry's address.

In the discussion of Mr. Perry's address the lead was taken by Mr. Austin V. Cannon, chairman of the Cleveland Bar Association's committee on jury selection, which has pioneered efforts to make the elective system in a large city yield better results through efforts of the organized bar, and by Mr. Andrew R. Sherriff, of Chicago, chairman of the Conference committee on co-operation between press and bar. The latter took a very positive position in criticizing current modes of selecting judges, and especially nomination by primaries.

"It is the human element on the bench to which we now must turn our attention. . . In theory ours is a government of laws and not of men. Assuming that laws are self-executing we may think of government by laws. But when we consider that laws and constitutions and written documents and precedents are all subject to interpretation and distortion by the man on the bench, we realize that ours is not in fact a government of laws, but a government of men; and the more ignorant the man on the bench and the more dependent, the more do we have a government of men and the less a government of laws."

While Mr. Sherriff did not give unqualified approval to the executive appointment of judges he referred to the great success of the Canadian system, under which judges are chosen under responsible party government.

"That is why we can look to Canada and bow our heads in recognition of results attained. I am not holding up Canadian judges as superhuman. They have in Canada no greater ability, no greater loyalty or patriotism than we have. But they have a *better system* and a better comprehension of the principles and the practice of government. We do not have to look far

for vastly better methods of establishing a judiciary than we now have."

In working for better modes of selecting judges the bar has an ally, Mr. Sherriff said, in the press.

"The job ahead of us is worth the dedication for the next twenty years of the efforts of every bar association in the country as its biggest undertaking. We must create anew the sentiment among lawyers that service on the bench is the highest and most honorable consummation of a successful career at the bar."

Judicial Appointment in Minnesota

Mr. Oscar Hallam, formerly a Minnesota judge, said that he firmly believed that the bar could, in his state, dominate the choice of judges without waiting for a constitutional amendment, if it would proceed with tact and persistence. Over ninety percent of Minnesota judges are in the first instance appointed (to fill vacancies). The bar has not exerted its proper influence before the governor has acted, but has been disposed, rather, to interest itself in the election which follows. Usually the appointee is confirmed by the popular vote. Judge Hallam hoped the Conference would further urge upon bar associations their duty to advise in respect to the nomination, election and appointment of judges.

Virginia's Appointive System

Speaking of the Virginia situation, Mr. Ivor A. Page, of Norfolk, said:

"We do not elect judges in our state. They are appointed by the governor and legislature. I believe that the majority of our people, and I am sure the majority of our lawyers, would scorn the suggestion that we should submit such a proposition to the people, who are thoroughly incompetent to decide who should be a judge and who should not be."

However, while Mr. Page knew of no unfit judge he said that the system of selection appeared to call for some change. The trouble is that the recommendations of a strong majority at the bar are sometimes ignored, and the minority members proceed to play politics.

"However, after hearing this discussion, I feel that I ought to say that we in Virginia are so far ahead of the rest of you that we are waiting for you to catch up.

New Jersey's Bi-Partisan Appointments

The New Jersey situation was spoken of by Mr. John F. Evans, who said that in his state the governor appointed subject to confirmation by the senate. Results have not been uniformly satisfactory. The element of politics enters into the selection.

"However we have found in the main that that method of selection has been successful. While many of the judges have fallen short, yet the example set by others on the bench has been very beneficial, and as a general rule the judges try to measure up to the standard of the finer members of the bench. Our Bar tried some years ago to exert a good influence through a committee of three advisers, but did not accomplish much. I believe results would have been better if the Bar committee had been more active, more aggressive, more insistent with the governor, and if they had availed fully of publicity to inform the whole bar of the true inwards of the situation. . . The judicial council, of which I am a member, has advocated bi-partisan appointments in all the courts, which has been satisfactory for a long period in the higher courts. On the whole, Mr. Chairman, I feel that from New Jersey's example I can recommend the appointment of judges by the governor, with the consent of the senate or some other appropriate body."

A motion offered by Judge Hallam was adopted to the effect that the Conference urge upon the collective bar of every judicial district that they actively take up the matter of selection of judges whenever a vacancy exists.

Study of Judicial Selection Approved

At this stage, when the time for noon adjournment had passed, interest in the subject of judicial selection appeared to be increasing. After some discussion a motion prevailed to the effect that the incoming chairman should appoint a committee, or assign to an existing committee the work of ascertaining the methods employed for the selection of judges throughout the country and recommending the best available method, for discussion at the next annual meeting, to the end that the Conference may make a recommendation to the American Bar Association for its action.

Mr. Frank W. Grinnell, of Massachusetts, chairman of the committee on rule-making power, secured approval of a motion which provided for circulation of the committee report among all federal court judges and the presidents and secretaries of state bar associations. The object was to further encourage conferences between members of the federal bar and the district and circuit judges in all states, to the end that the bench, and eventually the Conference of Senior Circuit Judges, should learn the practitioners' point of view in respect to rules and administration. The report shows considerable progress.

On behalf of the committee on accident litigation Chairman Henry S. Drinker, Jr. moved adoption of a resolution to the effect that the report already printed be referred back to the committee without action, that the committee be enlarged so as to represent all interests and views, and that a report be made for the next annual meeting at which, if feasible, opportunity shall be afforded for adequate discussion; also that the Conference recommend discussion of this subject to the state and local associations.

The Conference adopted a uniform set of by-laws submitted by the Executive Committee, wherein the purpose of the section was stated to be "to promote the objects of the American Bar Association and to secure co-operation between all bar associations through co-ordination of effort and unity of plan and purpose to the end that the Bar may faithfully discharge its duty of leadership in the development of our law and institutions."

Newly Elected Officers

The following officers were elected: Chairman, David A. Simmons, of Houston, Texas; Vice-Chairman, Robert H. Jackson, of Jamestown, N. Y.; Secretary, Herbert Harley, Ann Arbor, Mich.; Members of the Council for four years—Morris B. Mitchell, of Minneapolis, and Henry U. Sims, of Birmingham; Council member for three year term, Robert P. Shick, of Philadelphia.

The Conference adopted the following resolution on motion of Mr. Robert H. Jackson:

"RESOLVED, That, subject to the approval of the Executive Committee, the officers of this Conference devise financial ways and means and accept contributions from individuals and associations to defray the expenses of publication and of personal conference with the officers of state and local associations for the stimulation of interest and study of problems of the co-ordination of the Bar."

The third session of the Conference was the annual dinner in conjunction with the American Judicature Society. Chairman Wickser presided and the speakers were Dean Justin Miller of Duke University School of Law, Mr. Robert H. Jackson, member of the New York State Commission for the Investigation of the Administration of Justice, and Mr. James Grafton Rogers, Assistant Secretary of State. These speakers succeeded very well in mingling entertainment with information and so bringing to a close a long day devoted to serious affairs.

HERBERT HARLEY, Secretary.

REPORT OF THE JUDICIAL CONFERENCE

THE Judicial Conference provided for in the Act of Congress of September 14, 1922 (U. S. Code, Title 28, sec. 218) was called and sat for three days, September 29, September 30, and October 1, 1932. The following judges were present in response to the call of the Chief Justice:

First Circuit, Senior Judge George H. Bingham.

Second Circuit, Senior Circuit Judge Martin T. Manton.

Third Circuit, Senior Circuit Judge Joseph Buffington.

Fourth Circuit, Senior Circuit Judge John J. Parker.

Fifth Circuit, Senior Circuit Judge Nathan P. Bryan.

Sixth Circuit, Senior Circuit Judge Charles H. Moorman.

Seventh Circuit, Senior Circuit Judge Samuel Alschuler.

Eighth Circuit, Senior Circuit Judge Kimbrough Stone.

Ninth Circuit, Senior Circuit Judge Curtis D. Wilbur.

The Senior Circuit Judge for the Tenth Circuit, Judge Robert E. Lewis, was absent, and his place was duly taken by Circuit Judge Orie L. Phillips.

The Attorney General, the Solicitor General, and their aides were present.

State of the Dockets.—Number of cases begun, disposed of, and pending, in the Federal District Courts.—The Attorney General submitted to the Conference a report of the condition of the dockets of the Federal District courts for the fiscal year ending June 30, 1932, as compared with the fiscal year ending June 30, 1931. Each Circuit Judge also presented to the Conference a detailed report, by districts, of the work of the courts in his circuit.

The report of the Attorney General showed the comparative number of cases in each of the four major classes commenced and terminated during the fiscal years 1931 and 1932 respectively as follows:

	Commenced		*Terminated*	
	1931	*1932*	*1931*	*1932*
United States civil cases	25,332	34,189	25,010	29,591
Criminal cases	83,747	92,174	91,701	96,949
Private suits	24,000	26,326	24,375	26,045
Bankruptcy proceedings	65,335	70,049	60,322	63,502
Total	198,414	222,738	201,408	216,087

It thus appears that there was an increase in the number of cases concluded during the last fiscal year, over the number of cases concluded in the previous year, of 14,679. This gratifying showing was offset, however, by the fact that the number of cases begun during the last year was greater by 24,324 than the number of those begun in the year before. The result was a net increase in the number of cases pending, at the close of the fiscal year, of 6651. The distribution of this increase is shown in the following table:

Pending cases—	*1931*	*1932*
United States civil cases	21,642	26,240
Criminal cases	27,895	23,120
Private litigation	36,776	37,057
Bankruptcy proceedings	66,423	72,970
Total	152,736	159,387

As the Attorney General observed, the increase of 6547, as shown above, in the number of pending bankruptcy proceedings, reflects an accumulation of work, which, while it requires time and attention, does not operate materially to increase the pressure upon the courts. But the increase of 4598 in United States civil cases does involve a heavy addition to judicial work.

War Risk Insurance cases.—The cause of the increase in United States civil cases is found in the large number of war risk insurance cases. The Attorney General's report showed the number of these cases pending during the fiscal years 1931 and 1932, respectively, as follows:

	1931	*1932*
Pending, beginning of year	4,071	4,883
Commenced during year	2,795	8,213
Terminated during year	1,983	2,868
Pending close of year	4,883	10,228

There were approximately three times the number of cases of this sort begun during the fiscal year 1932 as compared with the preceding year, and, notwithstanding the fact that nearly 1000 more cases were terminated during the fiscal year 1932, the number pending at the close of the year, as compared with the previous year, was more than double,—the actual increase in cases pending being 5345. The serious burden created through the accumulation of cases of this description will apparently increase, and thus far no practicable method has been found to relieve it.

National Prohibition Act.—Civil cases.—The number of civil cases under the National Prohibition Act commenced, terminated and pending during the fiscal years 1931 and 1932 was as follows:

Prohibition civil —	*1931*	*1932*
Pending, close of previous year	6,704	6,975
Commenced during year	12,374	15,455
Terminated during year	12,103	15,490
Pending close of year	6,975	6,940

This statement shows an increase in this class of cases from 12,374 begun in 1931, to 15,455 begun in 1932. But the number of cases terminated increased in approximately the same ratio, and the number pending at the close of the year was slightly less than the number pending at the close of the preceding year.

Private suits.—The above tabulation of pending cases shows that there has been but little change in the number of private suits pending, notwithstanding the fact that the number of actions commenced during the last fiscal year was 26,326 as against 24,000 in the previous year.

Criminal cases.—It is especially noteworthy that there has been a decrease of 4775 in the number of criminal cases pending notwithstanding the fact that the number of criminal cases commenced during the year was 92,174 as against 83,747 begun during the previous year. It thus appears that despite the interruption of the activity of the courts near the close of the year, due to insufficient funds, and the heavy increase in the number of cases begun, the condition of the dockets has been improved by a material reduction in the number of pending criminal cases. This, as the Attorney Gen-

eral submits, is in the circumstances an exceptionally creditable achievement.

Criminal Cases under the National Prohibition Act.—The Attorney General's statement showed that there was an increase of 8555 in the number of these cases commenced, but there was also in increase of 7634 in the number of cases terminated. The result was that at the close of the year there were pending 15,360 of these criminal cases as against 18,555 at the end of the preceding year. The summary is shown in the following table:

Prohibition criminal—	*1931*	*1932*
Pending, close of previous year	22,671	18,555
Commenced during year	57,405	65,960
Terminated during year	61,521	69,155
Pending close of year	-18,555	15,360

Circuit Courts of Appeals.—In appellate work, there appears to be no problem in relation to the congestion of dockets. The Circuit Courts of Appeals continue to keep up with their work. There is, however, a special exigency in the Ninth Circuit where there are at present only two Circuit Judges. The pressure of the work of the District Courts is such that District Judges are not available to carry on continuously the work of the Circuit Court of Appeals. As a result, it appears that the Court has been compelled at times to sit with only two Judges. To provide adequate service in that Court there should not only be a successor to fill the vacancy caused by the death of Judge Rudkin, but there should be a removal of the existing limitation upon the appointment of a successor to Judge Gilbert (Act of March 1, 1929, c. 413, secs. 1 and 2, 45 Stat. 1414; U. S. Code, Title 28, sec. 213 (b)). The Conference renews its recommendation to this effect.

There is no need of additional Circuit Judges in other circuits.

District Courts.—While the Conference fully realizes the difficulties growing out of economic conditions and the imperative necessity for retrenchment in governmental expenses, the Conference deems it to be its duty to set forth the actual needs of the judicial department. Accordingly, the Conference, repeating former recommendations on this subject, again records its view that, in the instances mentioned below, the restrictions now imposed by statute on the filling of vacancies, which now exist or will arise in the District Courts, should be removed (U. S. Code, Title 28, secs. 3, 4, 4(h), 4(i)) as it is believed that the need for the judgeships mentioned is not temporary but permanent. The judgeships as to which this recommendation is renewed are the following:

Two in the district of Massachusetts; 2 in the southern district of New York; 1 in the eastern district of New York; 1 in the western district of Pennsylvania; 1 in the eastern district of Michigan; 1 in the eastern district of Missouri; 1 in the western district of Missouri; 1 in the northern district of Ohio; 1 in the southern district of California; 1 in the district of Arizona; 1 in the district of Minnesota; 1 in the southern district of Iowa.

It should be noted, in relation to these judgeships, that there are at present only three vacancies, —one in the southern district of New York, caused by the resignation of Judge Winslow; one in the eastern district of Michigan, caused by the appointment of Judge Simons as Circuit Judge; and one in the southern district of Iowa, due to the death of Judge Wade. As these are existing vacancies, it is deemed especially urgent that appropriate provision should be made for successors. In relation to the other judgeships above mentioned, where there is at present no vacancy, removal of the limitation on the appointment of successors is deemed to be advisable so as to avoid, when a vacancy arises, a serious interruption in judicial work because of the want of legislative authority for the filling of the vacancy.

Provision for additional District Judges.—In addition to legislative provision for the appointment of successors in the instances above mentioned, the Conference renews its recommendation for the creation of additional judgeships as follows:

Two additional district judges for the southern district of New York; 1 additional district judge for the eastern district of New York; 1 additional district judge for the northern district of Georgia; 1 additional district judge for West Virginia; 1 additional district judge for the southern district of Texas; 2 additional district judges for the southern district of California; 1 additional district judge for the western district of Missouri.

In this connection, the Conference reaffirms the views expressed last year in relation to conditions in Missouri and Louisiana as follows:

"With respect to the situation in Missouri, the Conference, upon an examination of conditions there, is satisfied that additional judicial service is needed and that an additional district judge, available for service in both the Eastern and Western Districts, would meet the exigency. The Conference therefore recommends, as above stated, an additional district judge for the Western District of Missouri, with the understanding that he shall be subject to assignment, under provisions of existing law, for such service as may be necessary in the Eastern District of Missouri.

"On consideration of the situation in Louisiana, the Conference is satisfied that no additional judgeship is needed in the Western District of Louisiana. The Conference is further of the opinion that judicial service can be adequately maintained in Louisiana by a combination of Eastern and Western Districts."

Assignments of Judges.—Last year the Conference called attention to the provisions of existing law for the assignment by the Senior Circuit Judge of any District Judge to service within the same judicial circuit when by reason of disability, absence of a District Judge, or the accumulation or urgency of business, the public interest so requires; and the Conference expressed the view that this authority should be exercised and the District Judges should willingly accept such assignments and thus aid the Senior Circuit Judge in the discharge of his duty under the statute.

The subject was again brought before the Conference at the present session and, emphasizing the duty as prescribed by law, the Conference adopted the following resolution:

"RESOLVED, That it is the sense of the Conference that whenever a Federal judge is assigned to work or service in a district court he shall accept that assignment and perform the work to which he is as-

signed as a duty imposed by section 23 of Title 28, United States Code (Judicial Code, sec. 19)."

Provision for travelling and subsistence of law clerks and secretaries to Circuit Judges and of secretaries to District Judges.—In his report to the conference, the Attorney General recited the recent efforts which he had made to reduce expenses and to maintain the essential service of the judicial department within the restricted appropriation. The Conference expressed its appreciation of these efforts and its entire sympathy with the purpose in view. It appeared, however, that the elimination of certain expenditures for needed clerical assistance to Circuit Judges when holding court at places required by law, and to District Judges, within their own circuit, had the effect of seriously impeding the work of Federal courts. The difficulties were very clearly set forth by members of the Conference in an exposition of the conditions obtaining in several circuits. A committee appointed to consider the subject brought in the following report and recommendation:

"Your committee, to which was referred the question of travelling and subsistence expenses of law clerks and secretaries to Circuit Judges and secretaries to District Judges, beg to report thereon as follows:

"Existing law provides for the payment of these and other expenses for holding court out of a lump-sum appropriation which is placed at the disposal of the Attorney General; but the amount appropriated by Congress for the current year is insufficient to meet all such expenses. Confronted with this situation the Attorney General has pared down the expenses provided for by law and has cut out entirely the traveling and subsistence expenses to which reference is above made. We are advised that such expenses usually amount to about $75,000. Of this amount a part is devoted to traveling and subsistence expenses of secretaries to District Judges where the District Judges go outside of their own Circuit to hold court in other Circuits. As to this part of expense we think the plan of the Attorney General might well be approved. But as to allowances to law clerks and secretaries where the Judges are holding court within their own Circuit we think the dispatch of business will be very much interfered with and the work of the Judges much delayed. The inevitable result will be further congestion of the dockets of both the District Courts and the Circuit Courts of Appeals. We therefore recommend the adoption of the following resolution:

"Be it resolved that the Attorney General be requested to authorize, when approved by the Senior Circuit Judge, the traveling and subsistence expenses for law clerks and secretaries to Circuit Judges and secretaries to District Judges in the respective Circuits and request a deficiency appropriation, if it shall be required, to cover such expenses."

The Conference adopted the resolution thus recommended.

Grand Jury Proceedings. — The Conference adopted last year a resolution in relation to the delay and expense caused by the necessity of both a preliminary examination and a presentment to the grand jury in cases where the accused intends to plead guilty, and the Conference recommended to the Attorney General a study of the matter and the consideration of the advisability of permitting in such cases a waiver of grand jury proceedings. The Attorney General reported that legislation to this effect is pending in the Congress.

Probation.—In response to a request of the Conference at its last session, the Circuit Judges presented reports with respect to the administration of the Probation Law in their respective circuits. Following discussion upon these reports, the following resolution was adopted:

"RESOLVED, That it is the sense of this Conference that the Probation System established by recent Act of Congress is a forward step in the administration of justice and that the purpose which it has in view should be furthered by the trial judges of the country; and it appearing, that for the proper administration of probation, a sufficient number of probation officers should be provided, and that the cost of an efficient Probation System will, in all probability, be more than offset by the saving of expense in prison administration:

"It is therefore recommended, That the Attorney General seek provision for the extension and efficient administration of the Probation System so far as the present state of the finances of the government will permit, and that he consider the advisability of securing such change in the law as will permit probation to be granted by the trial judge after, as well as before, execution of the sentence has been begun in cases in which the punishment imposed is one year or less."

Parole.—The Conference also adopted the following resolution with respect to action by the Parole Board:

"RESOLVED, That it is the sense of this Conference that the Parole Board, before passing upon an application for parole, should communicate with the Judge who has imposed the sentence and obtain his view as to whether or not the parole should be granted, and that said inquiry should be made within a reasonable time prior to the action of the Parole Board, and not merely at the time sentence is imposed; and that any Judge of whom such inquiry is made by the Parole Board should communicate to the Board his views in the premises with any recommendations which may seem proper."

Competency of spouses as witnesses in Federal criminal cases.—The Attorney General directed the attention of the Conference to a pending bill (H. R. 10596, 72d Congress, 1st session) which makes the husband or wife of a person charged with crime in United States courts a competent, but not compellable, witness for or against his or her spouse, except as to confidential communications. The Conference is of the opinion that the proposed legislation, in the interest of definitely removing an archaic rule, irresponsive to modern conditions, is highly desirable.

Rules of practice and procedure in criminal cases after verdict.—The Attorney General reported to the Conference that his study of the Federal criminal procedure, and of the causes for delay in the effective punishment of crime in the Federal Courts, has disclosed that the greatest delay in criminal cases is after the rendition of verdict, and that no effective control of, or remedy for, such delay is possible under existing statutes. The Attorney General stated that under the practice prevailing under ex-

isting statutes delays of from nine months to three years now intervene in many cases between verdict and the final mandate upon appeal. Avoidable delay in this class of cases is not due to a failure of the appellate courts, after the cases reach them, to act expeditiously. It is rather due to dilatory proceedings after verdict and before the cases are ready for appellate action.

The Attorney General called to the attention of the Conference the bill pending in the Congress (H. R. 10639, 72d Congress, 1st Session) to give the Supreme Court of the United State authority to prescribe rules of practice and procedure with respect to proceedings in criminal cases after verdict; and he expressed the opinion that, with the passage of this statute, rules could be framed which would result in the elimination of excessive delays in the disposition of criminal appeals.

The Conference approves this proposed legislation.

Circuit Conferences.—The report of Circuit Judges with respect to Circuit Conferences which have been held during the past year in several Circuits confirms the view of their utility. A Circuit Conference serves to bring together all the Federal Judges of the Circuit and thus to give opportunity for the consideration of problems with which they are confronted in seeking to eliminate obstructions to the prompt and efficient administration of justice in the several districts. It may be that these local conferences are not as necessary in Circuits that are relatively of small area, with large centers of population, in which Federal judges are brought in almost constant contact. In large portions of the country the District Judges have no such contact with each other or with Circuit Judges, and annual Circuit Conferences should be most helpful. It is strongly recommended that such conferences be held wherever feasible.

The Conference has also called attention to the desirability of promoting cooperation between the Bench and Bar in the several Federal districts, to the end that defects in administration which may be thought to exist may have appropriate attention, and that the most expert judgment may be utilized in devising remedies. It is believed that from the several districts, especially if aided by this cooperation, well-considered proposals may be brought to Circuit Conferences and thence to this Conference of Senior Circuit Judges. The advantage to this Conference of having before it proposals which have been carefully matured in this way is manifest.

Amendment of legislation with respect to the Judicial Conference.—The Conference has requested the Attorney General to urge such change in the statute, under which the Conference is organized, as should expressly authorize the Conference to recommend to the Congress, from time to time, "such changes in statutory law affecting the jurisdiction, practice, evidence and procedure of, and in the different district courts and circuit courts of appeals as may to the Conference seem desirable." The Attorney General has advised the Conference that legislation for this purpose is pending in the Congress. The Conference renews its recommendation as to the advisability of this legislation.

For the Judicial Conference:

CHARLES E. HUGHES,
Chief Justice.

October 3, 1932.

OPINIONS OF COMMITTEE ON PROFESSIONAL ETHICS

Opinion 68

(March 21, 1932)

Professional Functions—Delegation Of—A lawyer cannot properly delegate any of his professional functions to a layman.

Professional Functions—The writing of a collection letter over the signature of the lawyer is an exercise of his professional functions.

Letterheads—A lawyer cannot properly allow his letterhead to be used by a layman for the purpose of sending out form collection letters.

A member of the Association asks the Committee to express its opinion as to whether it is proper for an attorney to furnish his letterheads to a corporation client which proposes to write on them, over the attorney's supposed signature, collection letters to delinquent debtors.

The Committee's opinion was stated by MR. GALLERT, Messrs. Howe, Hinkley, Harris and Carney concurring.

It is professionally improper for a lawyer to furnish his letterheads to a client for the purpose stated. A lawyer is an officer of the court. As such, he assumes certain responsibilities, is under certain obligations and his conduct is subject to certain restrictions and limitations. A layman cannot be expected to know of these responsibilities and obligations of the lawyer or to conform to the restrictions and limitations surrounding his conduct. If it were proper for a lawyer to delegate his professional functions and allow laymen to write letters in his name, these restrictions and limitations, so far as they extend or apply to correspondence by a lawyer, would cease to be of any practical effect.

In addition, a lawyer has been given certain privileges by the state. Because of these privileges letters of the character stated in the question purporting to be written by attorneys have a greater weight than those written by laymen. But such privileges are strictly personal, granted only to those who are found through personal examination to measure up to the required standards. Public policy therefore requires that whatever correspondence purports to come from a lawyer in his official capacity must be at least passed upon and approved by him. He cannot delegate this duty of

approval to one who has not been given the right to exercise the functions of a lawyer.

Opinion 69

(March 19, 1932)

Business Cards—Improper to publish them in the daily papers of a metropolitan city.

"Local Custom"—under Canon 27—Whether such a custom exists in a given community is a matter which can be readily determined by the bar association which functions in that community.

Law Lists—A list of lawyers published in a daily paper is not a "law list" of the nature referred to in Canon 43.

The bar association of a metropolitan city asks the Committee to express its opinion as to whether it will be proper for lawyers to cause their cards to be inserted in a daily paper which is planning on publishing, possibly once a week, a list of the law firms in that city that will agree to subscribe for the space at certain fixed rates. The question states that the paper does not intend to accept such advertisements from individual lawyers, but only from law firms that subscribe. The Committee is specifically requested to determine whether such publication of their cards is permissible publication in a "law list," within the meaning of Canon 43.

The committee's opinion was stated by MR. HOWE, Messrs. Hinkley, Harris, Gallert and Carney concurring, Mr. Evans dissenting.

A profession has for its prime object the service it can render humanity; reward or financial gain should be a secondary consideration. One of the self-imposed austerities which distinguishes a profession from a business is that the members of a profession do not advertise for or otherwise solicit professional employment. In 1908, when the Association first formulated its ethical standards by the adoption of Canons of Professional Ethics, this feature of professional existence was expressed in Canon 27. At that time the use of professional cards in the advertising columns of local newspapers in small cities or rural communities had become sanctioned by long usage. In order that there should be no interference with what appeared to be a harmless "local custom," an exception permitting its continuance was inserted in Canon 27. We have heretofore expressed our opinion that the sanction thus given this "local custom" should not be extended to other publications or other customs. *Opinion 24.*

We have also held that whether such a "local custom" exists in any particular community is a matter for determination by the bar association (city, county or state) which functions in that community, unless that community be in a state whose disciplinary authorities have a definite rule on the subject. *Opinion 11.* Such a custom can only exist in a community where this form of advertising has been a long standing practice which has been followed generally by the entire bar of the community. It is not probable that it exists in any but smaller communities having a very limited bar. It does not seem possible that it could exist in any metropolitan city. If there be any contention to the contrary, the facts can be easily determined by the bar association of the city in which the custom is alleged to exist.

In 1928 the Association adopted Canon 43, defining what a professional card may properly contain and creating a further exception to the prohibition of Canon 27, by permitting "the insertion of such cards in reputable law lists." As Canon 43 fails to define the character of the publications to which it refers as "law lists," that duty devolves upon this Committee. The Canons of Professional Ethics are legislative expressions of professional opinion. In construing them we must look to the legislative intent as enlightened by the history of the subjects with which they deal and the facts surrounding their adoption.

The records and reports of the special committee which formulated Canon 43 and recommended it to the Association for approval show that numerous debates preceded its adoption and that, during the many months in which it was under consideration, a number of hearings were granted its advocates. The interested parties who appeared at these hearings urged the adoption of such a Canon on the ground that the publication in law lists of a lawyer's card containing references or the names of his clients would furnish useful information to those having matters which must necessarily be handled by lawyers in other cities. These interested parties included the publishers of the more prominent "law lists" then in existence, and representatives of an association of so-called "commercial lawyers," whose membership includes not only the representatives of these lists but also the representatives of collection agencies and a great number of lawyers who handle collections. The records of the committee show that its conclusions as to the facts were largely based on information secured from these authentic sources.

It appears that prior to the time the exception stated in Canon 27 was construed by the Committee in Opinion 11, the protecting cloak of that exception had been stretched to cover many practices which bore little semblance to that which it was intended to cover. One of the most common of such practices was that of lawyers causing their cards to be inserted in the advertising pages of "law lists." Although some of the lists published at that time contained a compilation of the laws of the various states and other legal data of interest, their primary purpose was to furnish, to those needing it, a list of the names and addresses of supposedly reliable lawyers in every section of the country. Such a list necessarily had to be national in character in order to be useful. While one or two of these lists were actually directories which endeavored to include the names of all lawyers in active practice, most of them contained the names of only those lawyers who contracted to pay for being thus "represented." Although these lists were not confined to the names of lawyers who specialized in the handling of collections, the greater number of them were of that nature. They were widely distributed, usually without charge, to lawyers, collection agencies, credit men and others for use in the forwarding of collection matters to lawyers in other sections.

These lists referred to the lawyers whom they listed as their "members" or "subscribers," and used various methods of obtaining information as to the amount of "business" which was forwarded to each subscriber. A majority of them solicited business for these subscribers, as the amount they charged the subscriber for "representation" was usually in proportion to the amount of business which they secured for him. The amounts paid by these lawyer subscribers for the insertion of their names and cards in these lists were in most cases the list's sole source of income. The publication of such lists was apparently very profitable as the committee was informed that about a hundred such lists were in existence. The only lists whose representatives appeared before the committee and the only

lists referred to in the committee's debates were lists of the character described. If any newspaper, magazine, trade journal or other periodical at that time carried any list of lawyers in its columns as a supplemental feature or adjunct, its publishers did not appear at the committee's hearings and no mention of such a list is made in the committee's reports.

These facts compel the conclusion that the "law lists" to which Canon 43 refers are lists of the nature described, and are not lists which are published as a supplemental feature or adjunct of a paper, magazine, trade journal or periodical which is primarily published for other purposes. Therefore a list of lawyers which is published in a daily paper is not a "law list" of the nature referred to in Canon 43 and the publication of a lawyer's card in such a list is not permissible under that Canon. It is therefore improper for a lawyer to cause his card to be published in a daily paper of any community where the publication of such cards is not a long standing custom generally followed by the members of the profession who practice in that community. The impropriety is the same whether the card be that of the individual lawyer or of a law firm of which he is a member. A law firm cannot possess any professional privilege which is not possessed by its individual members.

MR. EVANS, Dissenting:

I readily agree that a list of lawyers in a daily newspaper is not a "Law List" within the meaning of Canon 43 and also that the publication of cards in such newspaper lists is not expressly sanctioned by that Canon. However, that does not, in my opinion, dispose of the question here presented. I deny that the sanction of card publication in Law Lists by Canon 43 constitutes "a further exception to the prohibition of Canon 27" and deny that the reference to "local custom" in Canon 27 constitutes an exception to any rule or prohibition there announced.

Canon 43 merely supplements 27 and announces that "the insertion of such card in reputable law lists is not condemned." It is not condemned by 27 either. 27 merely declares that all card publications are "not per se improper" and leaves the matter open for decision on the facts of each case. Later on, it was deemed wise to go a step further and 43 was adopted and cards in reputable Law Lists were there expressly declared "not condemned." That is an amplification or "better statement" of the card publication rule of 27 and not an exception to it.

The language of Canon 27 does not, as I construe it, warrant the assumption that the publication of professional cards in newspapers, when sanctioned by local custom or otherwise, constitutes an exception to the prohibitions of that Canon. In my opinion, Canon 27 merely provides that the publication of professional cards—any time, any place—"is not per se improper." The references in it to "local custom" and to "personal taste" and "convenience" are not inserted to set up exceptions to the per se rule, but merely to illustrate why it is too difficult to attempt to do more than the Canon does do, i. e., declare such publications not per se improper and thereby leave each case to be determined upon the facts surrounding it. If the "local custom," "personal taste" and "convenience" references, one or all, were intended as exceptions, why were the words "per se" employed at all? Why not eliminate them altogether and prohibit outright the publication of cards except where sanctioned by local custom? The majority opinion (erroneously I believe) construes the Canon as though it were so worded. The language used clearly indicates that it was intended by that part of Canon 27 (a) neither to expressly condemn nor expressly sanction publications anywhere and (b) to explain why attempts at any such condemnation or sanction would be unfortunate, i.e., because the propriety thereof necessarily requires the consideration of many matters which are difficult to handle, such, for instance, as local custom, personal taste, convenience, etc. So, recognizing the delicacy of the situation and the difficulty of saying what cases of publication shall be condemned or sanctioned, the Canon was made to merely declare that publication of cards, generally speaking, is not to be deemed per se improper, and leaves each case to be decided upon its own facts. Local custom is often an unsafe guide and it was surely not intended that the sanction of local custom should control to the extent of approving—as it might and sometimes does—publications which the profession of the country would condemn as unwholesome. So I maintain that the "local custom" part of Canon 27 is thrown in for illustrative purposes only, just as were the "personal taste" and "convenience" parts, and bear no other relation whatever to the per se rule. Furthermore, if the reference to "local custom" constitutes an exception, does it not necessarily follow that the references there made, in exactly the same way, to "personal taste" and "convenience" also constitute exceptions? Attempts to build up workable exceptions on "personal taste" and "convenience" discloses, it seems to me, the absurdity of the whole exception claim.

While Canon 43 does not expressly sanction it, I find nothing in any of the Canons to condemn per se the publication of a lawyer's professional card in a list of lawyers in a daily newspaper. The question discloses nothing which seems to me to otherwise warrant disapproval of the publication there referred to and I am therefore of the opinion that it is not improper.

A Visit to the Tomb of St. Ives

(*Continued from page 795*)

"And now, in recognition of your noble and pious action, let us pray here for you and your country. Let us ask God to give to us and to all men and all peoples the spirit of justice and of love exemplified in the life of St. Ives; for only justice and love of fellow-men can procure for the world the ineffable blessing of Peace."

And, so saying, the warmhearted curé turned to the tomb of the Saint, fell upon his knees, and offered the prayer for help. This prayer added to the scene the final touch of simple and sincere dignity. It was a moment never to be forgotten.

Now, as to the Curé's proposal of a stained glass memorial window for the American Bar, why should it not receive our favorable response? Our profession has its ideals; they are shared by the profession in all countries. Those ideals—Law, Learning, and Justice for all—are exemplified personally in the life of the man Ivo, once lawyer and judge, now canonized in recognition of those virtues. Let our Bar be the first to symbolize this, in the place where his life was passed, and thus help to concentrate, for our profession everywhere, the inspiration of his example.

Such a window would cost about 25,000 francs, —say, $1,000. Would it not be fitting for our Bar Association to appoint a Committee to plan for its installation?

Michigan

JUSTIN R. WHITING
President, Michigan Bar Association

Michigan State Bar Association Approves Integrated Bar Bill

The Forty-Second Annual Meeting of the Michigan State Bar Association was held in Battle Creek on September 8 and 9. It was the consensus of opinion of those present that the meeting was one of the most instructive and constructive of those held in the recent year.

Final action was taken with reference to the bill which is to be introduced into the 1933 session of the Michigan state legislature providing for an integrated bar. A draft of a bill was presented to the meeting by the Committee on the Integrated State Bar, and after considerable discussion and criticism the draft was approved in principle and referred to the committee for the purpose of making necessary amendments and introducing it into the next legislative session. The chairman of the Committee on the Integrated State Bar is Mr. Carl V. Essery of Detroit.

Mr. John E. Tracy, Professor of Corporation Law in the University of Michigan Law School, presented an unusually instructive address on certain modern developments in corporation finance. He discussed in particular the tragic history of the lease-hold bond, certain aspects of public utility holding company financing, and certain phases of investment trusts.

Mr. Wilson W. Mills, chairman of the Board of the First Wayne National Bank of Detroit, read a valuable paper on certain economic aspects of federal relief legislation. He discussed the Reconstruction Finance Corporation, the Glass-Steagall Bill, and the Federal Home Loan Bank Bill.

The annual banquet of the Association was held on Friday evening, September 9, and proved to be an especially brilliant occasion. The after-dinner program consisted of three addresses. Justice Louis H. Fead of the Supreme Court of Michigan presented the respects of the Court and made some enlightening remarks concerning the character of oral argument expected by the Court from the members of the bar practicing before it. Mr. Alfred Huger of the Charleston, South Carolina, bar gave an address which ranks as one of the most delightful and entertaining after-dinner talks ever heard by the Michigan State Bar Association. His subject was "The Protean Profession." Judge James H. Wilkerson of the Federal District Court in Chicago read an especially thought-provoking paper on the subject of "The Challenge to the Courts."

The officers elected for the coming year are Justin R. Whiting of Jackson, President; Carl V. Essery of Detroit, Vice-President; E. Blythe Stason of Ann Arbor, Secretary; and Clare J. Hall of Grand Rapids, Treasurer.

Mississippi

Mississippi State Bar Meets Under Unified Bar Act—By-Laws Adopted —President Thompson Delivers Address

The Mississippi State Bar held its first annual meeting as a unified Bar on September 1st and 2nd at Jackson, Mississippi. This was, however, the 27th annual meeting of the State Bar Association, this meeting being held for the first time under the new unified Bar Act.

Never had such interest been manifested in a meeting of the Bar as was manifested at the Jackson meeting. Rules and Canons of Ethics closely resembling those of the American Bar Association were adopted as also were the by-laws that will govern the new unified bar. Under the recent act of the Legislature every attorney in active practice in the state is automatically a member of the state bar, and pays dues of $5. He becomes subject to the rules and regulations of the state bar.

There were approximately 500 attorneys attending the two days session and the meetings were lively with interest.

Hon. Guy A. Thompson, President of the American Bar Association, delivered an inspiring address and was received with tremendous applause.

Addresses were also made by Judge W. W. Venable, retiring president, Alf Stone, Chairman of the Mississippi State Tax Commission, Judge Stone Deavours, former National Democratic Committeeman and former Dean of the University Law School and Judge Jeff Truly, the new president of the Mississippi State Bar.

The title of the new organization as given it by the legislature is the Mississippi State Bar. Under the new act the State Bar is largely governed by a State Commission consisting of members from each Circuit Court district. These commissioners are: Hon. Fred B. Smith, Ripley; Hon. Lee D. Hall, Columbia; Hon. D. C. Bramlette, Woodville; Hon. John L. Heiss, Gulfport; Hon. J. D. Guyton, Kosciusko; Hon. C. E. Johnson, Union; Hon. Frank E. Everett, Indianola; Hon. W. W. Venable, Clarksdale; Hon. W. G. Roberds, West Point; Hon. R. M. Kelly, Vicksburg; Hon. C. C. Dun, Meridian; Hon. John Kyle, Sardis; Hon. Geo. W. Currie, Hattiesburg; Hon. W. D. Hilton, Mendenhall; Hon. Ben H. McFarland, Aberdeen; Louis M. Jiggitts, Jackson, and Hon. J. H. Price, Magnolia.

HON. JEFF TRULY
President, Mississippi State Bar

Officers of the Mississippi State Bar are: President, Jeff Truly; First Vice-President, J. H. Price; Second Vice-President, James McClure; Secretary-Treasurer, Louis M. Jiggitts.

LOUIS M. JIGGITTS, Secretary.

New Mexico

New Mexico Bar Association Holds Annual Meeting

Owing to the death of Justice F. W. Parker who had been on the Bench of the Supreme Court in New Mexico for almost 35 years the convention did not have its usual social function, but the meeting was mostly a memorial service in his honor. The Association was called to order by President M. C. Mechem and after prayer the roll call showed a good number in attendance. Following this, the President, Hon. M. C. Mechem, read his annual

paper based particularly on the question of taxation and what the Association might do to aid the solution of the matter.

The Committee on Ethics, Grievances and Discipline made its report, stating that a number of cases had been brought before them mostly for minor offenses which had been settled satisfactorily; that they had recommended the disbarment of one member, which recommendation the Supreme Court had acted upon by disbarment proceedings, and that two other matters were being referred to the Supreme Court with recommendation that disbarment proceedings should be brought.

The various standing committees made their reports and also the Committee on Legislation, which was very satisfactory to the Association, and by unanimous vote the incoming president was requested to continue the same Legislative Committee.

The Special Committee on Resolutions for Justice F. W. Parker, read its report which was adopted and the committee, consisting of Justice John C. Watson, Francis C. Wilson and Judge E. R. Wright, was requested to present the said resolutions at the afternoon meeting of the Supreme Court in conjunction with the Bar Association at the Memorial Services in honor of Justice Parker.

A rather lengthy report of the Committee on History and Chronology was read and adopted covering the names of all the attorneys who had died during the year in the number of ten. Following this the association listened to a very able and forcible paper on taxation by Ruperct F. Asplund, Secretary of the Tax Payers Association. During the noon recess a luncheon was served at the Fonday to the members of the Bar and it proved very delightful. After the meeting with the Supreme Court the Bar Association again met.

On the following day the Association, after attending to routine matters, selected Messrs. George S. Clock, Congressman Dennis Chavez and Francis C. Wilson as delegates to the American Bar Association meeting. This was followed by an announcement by the Secretary of the result of the election for members of the Board of Commissioners of the State Bar for the period of three years, Mrs. J. O. Seth of the First District, Mr. M. C. Mechem of the Second District and Mr. White of the Sixth District, having been duly elected for the term of three years. After which the Association adjourned sine die.

Following the adjournment of the Association the members elected and the ones holding over met and created its new organization by selecting H. M. Dow, of Roswell, President; E. L. Holt of Las Cruces, First Vice President; A. H. Darden of Raton as Second Vice President, and Jose D. Sena, Secretary-Treasurer.

JOSE D. SENA, Secretary.

HIRAM M. DOW
President, New Mexico State Bar Association

North Dakota

State Bar Association of North Dakota Holds Constructive Meeting

(From "Bar Briefs," Sept.)

The common expression of those whom we heard comment upon the annual meeting held at Fargo September 1 and 2 was: "It was the best, finest, most constructive meeting I have ever attended." Naturally, the success of any meeting depends upon the number that attend it. This meeting was attended, the registration list showing the largest attendance ever recorded. The fact that such a registration was effected speaks well for the local Fargo committee. No one else does, or has any right to claim credit for that registration.

The speakers gave an outstanding performance. They brought information and inspiration at a time when both those qualities are so frequently absent from public addresses. We express our appreciation to these gentlemen, again: Mr. Frederick H. Stinchfield of Minneapolis, Mr. William C. Green of St. Paul, Mr. Jerome Hall of the University Law School, Judge Andrew A. Bruce of Chicago (formerly of North Dakota), and Judge George E. Q. Johnson, of Chicago.

With less than the usual amount of incompetent, irrelevant and immaterial discussion, the Association was able to take definite action on a rather constructive program.

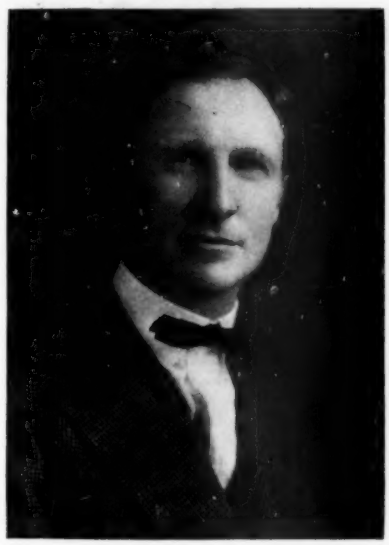
It recommended the continuance of the work of the Citizenship Committee.

It recommended reference of the very exhaustive, detailed program of the Criminal Law Committee to the district meetings and a new committee, final action to be taken by the next annual meeting.

It approved a recommendation to further the adoption of the uniform act providing for attendance of witnesses from without the state in criminal actions.

It recommended amendment of Section 7580 by requiring a schedule of all personal property on claims for exemption in garnishment proceedings.

It referred to the incoming Executive Committee for action the proposal to amend the workmen's compensation law by allowing appeals on questions of fact.



W. H. HUTCHINSON
President, North Dakota Bar Association

It instructed the Legislative Committee to prepare an amendment restoring to the courts the power of directing verdicts, thus disapproving the committee recommendation.

It directed the new Committee on Unauthorized Practice to prepare a bill defining the practice of law.

It recommended the repeal of the bad check law (Section 9971).

It recommended amendment of Section 7451 to read: "Sham and irrelevant answers and defenses may be stricken out on motion and upon such terms as the Court may in its discretion impose."

It disapproved an amendment to re-

duce the attorney's license fee to $6.00 per year.

It recommended modification of the Jury System by making trials involving less than $200 in District Court and less than $50 in County Court triable to the Court unless a jury is demanded, but disapproved the proposal to charge the jury fees against the litigants.

It disapproved a recommendation to allow examination of jurors by the Court as in Federal practice.

It approved the recommendation to permit waiver of jury trial in criminal cases.

It approved changes in the Fee Schedule as follows: Collection charges to be 15% for the first $500, 10% for the next $500, and 5% on the amount over $1,000; adopted the Lake Region District Schedule of $1.00 deposit with every collection item, and 50c for reports, printed circulars bearing the signature of the Association to be distributed to attorneys.

It approved the recommendations of the Committee on Unauthorized Practice, enlarged the scope of the Committee to include the making of agreements with responsible organizations and associations, and authorized the appointment of a prosecuting committee to start prosecutions where negotiations fail. In furtherance of this recommendation, it approved an amendment to the Bar Board Act to make the license fees available for such prosecutions, and also approved an assessment of $2.00 per member for the same purpose. (As Article 2 of the By-Laws provides that no assessment shall be for more than $1.00, the additional $1.00 will have to be in the nature of a voluntary contribution.)

Officers elected for the ensuing year are: W. H. Hutchinson, LaMoure, President; J. P. Cain, Dickinson, Vice President; R. E. Wenzel, Bismarck, Secretary. These officers, with the District Presidents, constitute the Executive Committee.

South Carolina

THOMAS F. McDOW
President, South Carolina Bar Association

South Carolina Bar Association Meeting

The South Carolina Bar Association held one of its largest annual meetings and was delightfully entertained by the Bar of Greenville, S. C. on May 26 and 27.

A resolution was introduced by Mr. W. S. Nelson, of Columbia, favoring the repeal of the Eighteenth Amendment, which resolution was passed by a vote of 52 to 40 after considerable discussion.

Mr. Gyles Patterson, of Jacksonville, Florida, read a paper on the subject of the right of a State to break a contract by framing new laws after the contract has once been made.

An address of welcome was delivered to the Association on behalf of the City of Greenville by J. Robert Martin, President of the Greenville Bar Association.

Hon. Clyde Hoey, Ex-Congressman of Shelby, N. C., delivered the principal address, his subject being "The Lawyer and His Place Before the Public."

Mr. Thomas F. McDow, prominent attorney of York, was elected president for the year 1932-33.

Mr. McDow was born at Liberty Hill, S. C., December 27, 1863. His father was a very prominent physician. His family was one of the largest land and slave holders in Lancaster.

He was educated at Bingham School at Mebane, N. C., and later at South Carolina College. He was admitted to the Bar in 1885 and served a number of times as Special Judge on the Supreme Court of the State and is considered one of the ablest trial lawyers on both the criminal and civil side of the Court.

He served two terms in the Legislature and was a prominent advocate of woman suffrage. During the war he was appointed Government Appeal Agent and was one of the staff of speakers of the Southern division of the Red Cross.

In 1893 Mr. McDow was married to Mary Simons Clarkson, Charlotte, N. C. He is the father of two children, his son, Clarkson McDow, being private secretary to Federal Judge G. Lyles Glenn.

He is a member of the Alpha Tau Omega fraternity, a Knight Templar and an officer in the Presbyterian Church.

J. M. CANTEY, JR.,
Executive Secretary.

INDEX TO VOLUME XVIII

(N. B. By error the pagination for 1931 was carried on through the January, 1932, issue. To prevent misunderstanding, references to that issue are specifically marked "January.")